S. HRG. 99-586

CABLE-PORN AND DIAL-A-PORN CONTROL ACT

HEARING

BEFORE THE

SUBCOMMITTEE ON CRIMINAL LAW

OF THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

NINETY-NINTH CONGRESS

FIRST SESSION

ON

S. 1090

A BILL TO AMEND SECTION 1464 OF TITLE 18, UNITED STATES CODE, RELATING TO BROADCASTING OBSCENE LANGUAGE, AND FOR OTHER PURPOSES

JULY 31, 1985

Serial No. J-99-46

Printed for the use of the Committee on the Judiciary

U.S. GOVERNMENT PRINTING OFFICE

58-804 O WASHINGTON : 1986

For sale by the Superintendent of Documents, Congressional Sales Office
U.S. Government Printing Office, Washington, DC 20402

S521-55

COMMITTEE ON THE JUDICIARY

STROM THURMOND, South Carolina, *Chairman*

CHARLES McC. MATHIAS, Jr., Maryland
PAUL LAXALT, Nevada
ORRIN G. HATCH, Utah
ALAN K. SIMPSON, Wyoming
JOHN P. EAST, North Carolina
CHARLES E. GRASSLEY, Iowa
JEREMIAH DENTON, Alabama
ARLEN SPECTER, Pennsylvania
MITCH McCONNELL, Kentucky

JOSEPH R. BIDEN, Jr., Delaware
EDWARD M. KENNEDY, Massachusetts
ROBERT C. BYRD, West Virginia
HOWARD M. METZENBAUM, Ohio
DENNIS DeCONCINI, Arizona
PATRICK J. LEAHY, Vermont
HOWELL HEFLIN, Alabama
PAUL SIMON, Illinois

DENNIS W. SHEDD, *Chief Counsel and Staff Director*
DEBORAH K. OWEN, *General Counsel*
DEBORAH G. BERNSTEIN, *Chief Clerk*
MARK H. GITENSTEIN, *Minority Chief Counsel*

SUBCOMMITTEE ON CRIMINAL LAW

PAUL LAXALT, Nevada, *Chairman*

STROM THURMOND, South Carolina
CHARLES McC. MATHIAS, Jr., Maryland
ARLEN SPECTER, Pennsylvania

JOSEPH R. BIDEN, Jr., Delaware
EDWARD M. KENNEDY, Massachusetts
HOWARD M. METZENBAUM, Ohio

WILLIAM S. MILLER, Jr., *Chief Counsel and Staff Director*

CONTENTS

OPENING STATEMENT

Page

Denton, Hon. Jeremiah (acting chairman) 1

PROPOSED LEGISLATION

Text of S. 1090—A bill to amend section 1464 of title 18, United States Code, relating to broadcasting obscene language, and for other purposes 10
Agency view (Federal Communications Commission) 14

CHRONOLOGICAL LIST OF WITNESSES

Helms, Hon. Jesse, a U.S. Senator from the State of North Carolina 1
Smith, Jack D., General Counsel, Federal Communications Commission 21
Clancy, James J., attorney, Los Angeles, CA 47
Taylor, Bruce A., vice president and general counsel, Citizens For Decency Through Law, Inc., Phoenix, AZ 65
Panel consisting of: Hon. Thomas J. Bliley, Jr., a Representative in Congress from the Commonwealth of Virginia; Lee Hunt, Midlothian, Virginia; and Harold L. Cole, Jr., Richmond, VA 82
Lynn, Barry W., legislative counsel, American Civil Liberties Union 97

ALPHABETICAL LISTING AND MATERIALS SUBMITTED

Bliley, Hon. Thomas J., Jr.:
  Testimony 82
  Letter to Hon. Mark S. Fowler, dated April 19, 1985, re proposed rule-making 83
  Prepared statement 88
Clancy, James J.:
  Testimony 47
  Prepared statement 55
Cole, Harold L., Jr.: Testimony 95
Helms, Hon. Jesse:
  Testimony 1
  Prepared statement 2
Hunt, Lee: Testimony 95
Lynn, Barry W.:
  Testimony 97
  Prepared statement 106
  Response to questions 118
Smith, Jack D.:
  Testimony 21
  Prepared statement 29
  Response to questions 36
Taylor, Bruce A.:
  Testimony 65
  Prepared statement 75

APPENDIX

Letters and statements from:
  Freedom of Expression Foundation, Inc 122
  Case studies of Simon B. Miranda, Ph.D., psychologist 134
  Veterans' Administration 137
  Morality in Media, Inc 139

CABLE-PORN AND DIAL-A-PORN CONTROL ACT—S. 1090

WEDNESDAY, JULY 31, 1985

U.S. SENATE,
SUBCOMMITTEE ON CRIMINAL LAW,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The subcommittee met, pursuant to notice, at 10 a.m., in room 226, Dirksen Senate Office Building, Hon. Jeremiah Denton (acting chairman) presiding.

Also present: Senators Thurmond and Specter.

Staff present: Beverley McKittrick and Frederick Nelson, counsels, Subcommittee on Criminal Law; Carol Clancy, professional staff member for Senator Denton; Richard D. Holcomb, general counsel, and Fran Wermuth, chief clerk, Subcommittee on Security and Terrorism.

OPENING STATEMENT OF SENATOR JEREMIAH DENTON

Senator DENTON. Good morning. I am going to call the hearing to order 1 minute ahead of time because the originator of the bill which is the subject of today's hearing, the chairman of the Agriculture Committee, Senator Jesse Helms, my colleague and friend from North Carolina, has to chair a meeting of the Agriculture Committee.

The events in the Agriculture Committee are at a crisis stage, as is the budget negotiation. So in deference to that, we will, without further delay, call the first witness, Senator Jesse Helms. Thank you, Senator, for coming.

STATEMENT OF HON. JESSE HELMS, A U.S. SENATOR FROM THE STATE OF NORTH CAROLINA

Senator HELMS. Mr. Chairman, I thank you very much. As always, you are gracious, kind, and thoughtful. I do have the responsibility of starting an Agriculture Committee markup hearing this morning at 10, just now.

The bad news is that we are still $30 billion over the budget, so if you will let me compress my statement a little bit and make what I hope are the salient points, then I will leave.

But I do thank you and the committee for your courtesy in calling this hearing.

Senator DENTON. Without objection, your complete written statement will be included in the record, sir.

Senator HELMS. I thank the Chair.

[Prepared statement follows:]

PREPARED STATEMENT OF SENATOR JESSE HELMS

Mr. Chairman, I am most grateful that you and the Criminal Law Subcommittee are taking the time today to consider my Cable-Porn and Dial-a-Porn Control Act, S. 1090. I also appreciate the attention given this legislation by the distinguished chairman of the full Judiciary Committee, Senator Thurmond. With your help and the help of the other Judiciary Committee members, I am hopeful that the Senate will be able to act expeditiously to curb pornography and obscene matter on cable television and in interstate telephone service.

Mr. Chairman, I also extend my sincere thanks to the witnesses who have made the effort to be here today. Many people complain about the increasing amounts of pornography in our society and worry about the effects it is having on young people. But few take the time and make the effort to impress on their legislators the seriousness of this problem.

The Halls of Congress are full of high-powered, well-paid lobbyists representing various financial interests—we may even have a few here today representing those whose profits come from the porn industry. But the people who oppose pornography—and this includes the overwhelming majority of Americans in my opinion—have no economic interest at stake. They are simply concerned about humane values and what used to be called common decency.

In short, it is not the vested interests who oppose pornography, but it is the mothers and fathers concerned about the moral well-being of their children, the wives abandoned by over-sexed husbands, and the many others who have been victimized in one way or another by widespread pornography.

Mr. Chairman, I strongly hope that in considering this legislation the committee will weigh heavily the concerns of ordinary Americans who want to be free of this scourge of pornography.

Mr. Chairman, let me briefly describe the purposes of my bill. First, S. 1090 broadens section 1464 of title 18 of the U.S. Code. Currently, this section prohibits broadcasting "obscene, indecent, or profane language by means of radio communication" and prescribes a maximum $10,000 fine or 2 years in prison, or both. This language dates from a 1948 enactment and needs to be updated in keeping with advances in technology since then. S. 1090 expands section 1464 to include transmitting "obscene, indecent, or profane" material "by television, including cable television," in addition to the current language "by radio communication." In other words, the 1948 statute is broadened to include broadcast and cable television in addition to radio. Also my bill increases the maximum fine to $50,000.

Second, S. 1090 eliminates interstate telephone service as a means to communicate so-called dial-a-porn messages. Currently, section 223(b) of the Communications Act of 1934 proscribes dial-a-porn-type operations with one major exception. Subsection (b)(2) provides a safe harbor for dial-a-porn operators; it states: "It is a defense to a prosecution under this subsection that the defendant restricted access to the prohibited communication to persons eighteen years of age or older in accordance with procedures which the Commission (the FCC) shall prescribe by regulation." Since its enactment in December 1983, this subsection has been the subject of litigation, and in practice it has rendered the entire section (b) meaningless. In essence, the second major purpose of my bill is simply to remove this loophole by eliminating the safe harbor provision. After enactment of my legislation, the law would proscribe completely, with no exceptions, the operation of dial-a-porn enterprises.

Let me close by directing the attention of the committee to a William F. Buckley column of July 15, 1985, dealing with the general problem of pornography. Mr. Buckley, it seems, received a form letter from the editorial director of Playboy magazine soliciting the use of his name in a forthcoming Playboy advertising campaign directed against those who urge boycotting stores selling Playboy. One proposed ad begins: "The American experiment, after more than 200 years, is working out just fine. Americans are still free to speak, to write, to think and act as they choose. That's what the American experiment is all about."

"But you see," counters Mr. Buckley in his column, "the American experiment is not working out just peachy-keen. The current issue of Newsweek magazine announces that by the end of the decade as many as one-half of the children of America will be raised by single parents. Between 1970 and 1980, illegitimate births in the white community rose from 6 to 11 percent, and in the black community, from 38 to 55 percent."

Buckley asks, "Because they all read Playboy?" And then he answers, "Of course not but it is unquestionably the case that self-indulgence (the 'Me Decade') had a great deal to do with the fragility of personal relations. Wanton sex, like wanton booze or wanton idleness or wanton thought, breeds undesirable things, among them bastards, but also broken homes. And broken homes breed things like violence, neglected children, and drug addiction, the stigmata of modern America. Most emphatically not what the American experiment is all about. It is hardly Playboy's exclusive responsibility that this should be so. But we have traveled a long distance from Nathaniel Hawthorne, who awarded a scarlet letter to adulterers, to Hugh Hefner, who thinks adultery is good plain wholesome American fun."

Mr. Chairman, I believe Buckley's point is well taken, and I urge the committee's favorable consideration of my legislation. Thank you for holding this hearing today.

Senator HELMS. Mr. Chairman, the Cable Porn and Dial-a-Porn Control Act, S. 1090, pretty well speaks for itself. Having expressed my appreciation to you, Mr. Chairman, I also appreciate the attention given this legislation by the distinguished chairman of the Judiciary Committee, Senator Thurmond.

With your help, his help, and the help of other Judiciary Committee members, I am hopeful that the Senate will be able to act expeditiously to curb pornography and obscene matter on cable television and in interstate telephone service.

Mr. Chairman, I also extend my sincere thanks to the witnesses who have made an effort to be here today.

Many people complain about the increasing volume of pornography in our society and they worry about the effect it is having on young people, but when it comes down to the push and shove of it, few take the time or make the effort to impress on their legislators the seriousness of the problem.

Meanwhile, the Halls of Congress are full of high-powered, well-paid lobbyists representing various financial and other interests. We may even have a few here today representing those whose profits come from the porn industry.

But the people who oppose pornography—and this includes the overwhelming majority of Americans, in my judgment—have no economic interest at stake. They are simply concerned about humane values and what used to be called common decency.

In short, it is not the vested interests who oppose pornography, but it is the mothers and fathers concerned about the moral well-being of their children, the wives abandoned by over-sexed husbands, and the many others who have been victimized in one way or another by widespread pornography.

Mr. Chairman, I strongly hope that in considering this legislation, the committee will weigh heavily the concerns of plain, ordinary Americans who want to be free of this scourge.

Let me briefly describe the purposes of my bill. First of all, S. 1090 broadens section 1464 of title 18 of the United States Code. As the Chair knows, this section currently prohibits broadcasting "obscene, indecent, or profane language by means of radio communication," and prescribes a maximum $10,000 fine or 2 years in prison, or both.

This language dates from a 1948 enactment, and I think it needs to be updated in keeping with the advances in technology since that time. S. 1090 expands section 1464 to include transmitting "obscene, indecent, or profane" material "by television, including cable television," in addition to the current language, "by radio communication."

In other words, the 1948 statute would be broadened to include broadcast and cable television, in addition to radio. Also, my bill would increase the maximum fine to $50,000.

Second, S. 1090 eliminates interstate telephone service as a means to communicate so-called dial-a-porn messages. Currently, section 223(b) of the Communications Act of 1934 proscribes dial-a-porn operations, with one major exception.

Subsection (b)(2) provides a safe harbor for dial-a-porn operators because it states: "It is a defense to a prosecution under this subsection that the defendant restricted access to the prohibited communication to persons 18 years of age or older, in accordance with procedures which the Commission," meaning the FCC, "shall proscribe by regulation."

Since its enactment in December 1983, this subsection has been the subject of litigation, and in practice it has rendered the entire section (b) meaningless. In essence, the second major purpose of my bill is simply to remove this loophole by eliminating the safe harbor provision. After enactment of my legislation, the law would proscribe completely, with no exceptions, the operation of the so-called dial-a-porn enterprises.

Let me close, Mr. Chairman, by directing the attention of the committee to a column by my friend and yours, Bill Buckley. It was published on July 15 of this year, a couple of weeks ago, dealing with the general problem of pornography.

Bill Buckley, as I understand it, received a form letter from the editorial director of Playboy magazine soliciting the use of Bill Buckley's name in a forthcoming Playboy advertising campaign directed against those who urge boycotting stores selling Playboy magazine.

One proposed ad began: "The American experiment, after more than 200 years, is working out just fine. Americans are still free to speak, to write, to think, and act as they choose. That's what the American experiment is all about."

Well, what did Bill Buckley say in response? He said: "But you see, the American experiment is not working out just peachy-keen. The current issue of Newsweek magazine announces that by the end of the decade as many as one-half of the children of America will be raised by single parents. "Between 1970 and 1980, illegitimate births in the white community rose from 6 to 11 percent, and in the black community from 38 to 55 percent." That is quoting Bill Buckley.

Now, I continue to quote him: "Because they all read Playboy?" And then Mr. Buckley answered his own question: "Of course not. But it is unquestionably the case that self-indulgence—the me decade—had a great deal to do with the fragility of personal relations. Wanton sex, like wanton booze, wanton idleness, or wanton thought, breeds undesirable things, among them," and these are Bill Buckley's words, "among them bastards, but also broken homes. And broken homes breed things like violence, neglected children, and drug addiction, the stigmata of modern America. Most emphatically not what the American experiment is all about," Bill Buckley said.

"It is hardly 'Playboy's' exclusive responsibility that this should be so, but we have traveled a long distance," Bill Buckley says,

"from Nathaniel Hawthorne, who awarded a scarlet letter to an adulteress, to Hugh Hefner, who thinks adultery is good plain wholesome American fun."

Mr. Chairman, I believe Bill Buckley's point is well taken, and I do urge the committee's favorable consideration of my legislation. And I do thank you for your indulgence in allowing me to appear here this morning.

Senator DENTON. Thank you, Senator Helms. We understand that you must now depart because of your obligations to the Agriculture Committee. If you had the time and could stay to hear the remaining witnesses testify, you would hear more information and, if I may say so, you would hear them acknowledge and praise your involvement and your consistent leadership in this area, which you have demonstrated since you came to the Senate in 1972.

Since your senatorial obligations require your presence at the Agriculture Committee, I will read your full statement. Thank you very much.

Senator HELMS. I thank you very much. I can tell this to you with all certainty. I would rather be here than where I am going, but I have no choice about it. Thank you very much.

Senator DENTON. I certainly understand.

I would like to acknowledge the arrival of our friend and colleague from Pennsylvania, Senator Arlen Specter. Senator Specter, we began a little early because Senator Helms, has to chair a meeting of the Agriculture Committee this morning.

I have not as yet made my opening statement or introductory remarks. As soon as I can I will defer to you for any remarks you may wish to make.

Senator SPECTER. Thank you, Mr. Chairman.

Senator DENTON. Indeed, if you are in a hurry and cannot stay more than a minute or so, I will defer to you now.

Senator SPECTER. No. Let me listen to your opening statement. Then I will have a word or two to say.

Senator DENTON. The subcommittee is meeting today to receive testimony on the Cable-Porn and Dial-a-Porn Control Act, S. 1090, a bill introduced by Senator Jesse Helms, who just testified. I cosponsored the bill, together with Senator East.

Normally, the hearing would be conducted by Senator Laxalt, the chairman of the Subcommittee on Criminal Law. Senator Laxalt has asked that I chair today's hearing, and I am pleased to do so.

The hearing addresses a serious problem facing the Nation—the invasion of the American home by pornographers through the use of cable television and interstate telephone service for the transmission of pornographic materials.

Before I proceed to list the witnesses who will be here today, let me read a letter, which, like the Bill Buckley column, mentioned by Senator Helms, was written by a member of the media.

There are many such letters and columns which come from liberals and conservatives, demanding that the Federal Government give attention to this problem.

This letter is from Jack Anderson, a noted columnist. He sent this letter to each Member of Congress not long ago. I think we received it about May 1, 1984. He dated it April 26, 1984.

This is the letter: "Dear Member of Congress: Not long ago, I switched on the television set in a Sacramento, California, hotel room. I was astounded to see a man and woman, both stark naked, in the middle of a graphic, explicit sex act. The hotel manager told me the programming came off cable television."

I must note at this point, breaking into the quotation, that it seems that Mr. Anderson had been misinformed by the hotel manager about the transmission medium having been cable television. The program was transmitted via some type of satellite or microwave television system, and was not cable television.

But I will continue to read Mr. Anderson's letter:

This led me to conduct an investigation. I discovered that lurid sex scenes, sex acts and other obscenities are not uncommon on cable television. I am told that children across the country are getting their sex education from these lascivious programs.

The word has spread through locker rooms in junior and senior high schools from New York to California. The youngsters just turn on cable television in their living rooms or they go to the home of a friend whose parents are out. In the sanctity of the home, children are watching films they'd be forbidden to see in a theater. The theater owner would be hauled into court if he let minors watch the perverted shows that are available on cable television.

I have put together on the enclosed tape some typical scenes from cable television. I want you to see for yourself the shameful, exploitative, filthy, obscene, lewd, indecent sex programming now available for our children to watch on cable television.

No sex orgies that have occurred in bed, behind a barn or in a whorehouse could be any worse than what our children can see now in their living rooms. The producers of these films have the morality of Sodom and Gomorrah.

Please take six minutes to watch this videotape. Then I would like your reaction for publication in my column. Tell me, if you will, what you think Congress should do about this prurient programming.

I can tell you what Congress will be asked to do. In the next few weeks, the House will be asked to adopt H.R. 4103, which will even further loosen public control over cable content. If the bill becomes law, a franchising authority may not regulate the provision or content of cable services, except insofar as "such cable services are obscene or are otherwise unprotected by the Constitution of the United States."

Don't be misled by this caveat. Legislative experts tell me the bill, in effect, would strip away what little authority is now available to keep these perverse programs out of our homes.

Please understand I support cable television. There is too much fine programming on cable television to have it tainted by the hard-core pornography that some cable companies pipe into our homes. My purpose is to protect the industry from the depravity of a few greedy profiteers.

Nor do I want to do damage to the First Amendment. I take second place to no one in championing freedom of expression. But as a society, we have learned to take measures to protect ourselves against many things. We endeavor to isolate those who commit theft or violence. Against the spread of communicable diseases, we impose quarantines. Against those responsible for other hazards to public health or safety, we invoke injunctions and penalties.

But there are some things that we have not been effective in protecting ourselves against. One is hard-core pornography, which degrades women and lowers humankind to the animal level. Depraved sex scenes scar the minds of young people who watch them. If we were to spread poison where people were likely to be exposed or injured by it, we would expect severe penalties. But those who befoul the moral and intellectual atmosphere with offensive programs are polluting the environment as surely as though they were spreading something toxic.

Surely, it would seem that our need to protect ourselves from mental infection is at least as great as our need for protection against physical hazards. Freedom of expression is a glorious right and privilege, but indecent, perverted pornographic programming is an abuse of freedom.

I solicit your comments. Sincerely, Jack Anderson.

I can recall several other strong statements by political commentators in the media concerning the need to protect our children by reducing the pornographic imagery present in our environment.

For example, Morton Kondrak, in relating the problems related to adolescent pregnancy and illegitimate births, wrote in the Washington Post, "* * * it might help, too, if President Reagan would speak to his friends in Hollywood about the extent to which they have oversexed American society."

William Raspberry is another commentator who has expressed similar concerns. There is a growing coalition of individuals, from all walks of life and political beliefs, including leftwing political thinkers and rightwing political thinkers, who have formed a consensus that Congress should regard this problem as a major issue.

As a member of the Senate Committee on the Judiciary, and as the former chairman of the Senate Subcommittee on Family and Human Services, I have heard testimony from many citizens whose lives have been affected by the negative influence of pornography, as well as from sociologists, psychologists, and other professionals, concerning the negative effect of pornographic materials. I am familiar with the problem of how to restrain pornography and its bad effects, without abridging the first amendment.

The witnesses today include Senator Helms—who has already made his opening statement—Hon. Thomas J. Bliley, Jr., Member of the U.S. House of Representatives from the Commonwealth of Virginia, and two of his constituents: Mr. Lee H. Hunt and Mr. Harold L. Cole, Jr., parents of children who developed habitual use of a dial-a-porn interstate phone number.

The next witness is Jack D. Smith, General Counsel for the FCC; Mr. James J. Clancy, an attorney from Los Angeles, CA; Mr. Bruce A. Taylor, an attorney from Phoenix, AZ, who is currently representing the county attorney of Maricopa County, AZ, and the Arizona State Attorney General in a State dial-a-porn case; and finally, Mr. Barry Lynn, legislative counsel for the American Civil Liberties Union.

A number of other witnesses were also invited, and I would like note to be taken of these people who were unable to attend today's hearing because of scheduling conflicts. They have been invited to submit written statements for the record.

Dr. Dolf Zillman, professor of psychology, communications, and semiotics at the Institute for Communication Research, Bloomington, IN; Mr. Wyatt Durrette, an attorney from Richmond, VA; Dr. Victor Cline, professor of psychology at the University of Utah; Mr. Burton Joseph, Mr. Bruce J. Ennis, and Mr. David W. Ogden, representing Playboy Enterprises, Inc.; and a representative from the Department of Justice.

The Department of Justice, as many of you know, is conducting a study on the subject of pornography, and has formed the U.S. Attorney General's Commission on Pornography. I recently testified at the opening hearing of the Commission in Washington, DC, last June.

In a long line of cases, the U.S. Supreme Court has consistently held that obscene material is not protected by the first amendment. Moreover, the Supreme Court has held that especially where dissemination to children is involved, there is a species of speech which is "indecent" or "harmful to minors," and, as a matter of constitutional law, is subject to regulation under certain circumstances even though the speech is nonobscene; that is, it does not

meet the full obscenity test set forth in the landmark obscenity case, *Miller* v. *California*.

Where children are exposed, there is a more restrictive attitude which, by law, should be taken in the area of regulation.

The subject of pornography admittedly concerns me for a number of reasons. I want to make clear for the record that I am not against pornography and obscenity because I am a prude or because I wish us to return to a Victorian age.

I am concerned as a Senator that I participate responsibly in writing and enforcing law. I am aware that we are supposed to promote the general welfare and provide for the domestic tranquility.

The domestic tranquility, well-being, and the general welfare, in my view, are at risk and are being injured by lack of legislative initiatives and prosecutorial action directed against pornography.

As I learn of the harmful effects of pornography, and at the same time notice the growth of pornography and the lack of effective law enforcement to contain that growth, I am alarmed.

The lack of effective control by law enforcement over the pornography situation has a number of implications. I am a member of the Committee on the Judiciary. I presided over hearings on the subject of the influence of organized crime on the pornography industry, and am familiar with the economic motivation behind the sexual exploitation industry, as well as its impact upon society.

There are reports which indicate that organized crime dominates distribution in the United States and invests those profits in other criminal activities, such as loan sharking and narcotics. A report issued by the attorney general of the State of California, entitled "Organized Crime in California 1982–1983," states that pornographers with firm links to organized crime have entered the cable television and subscription television industry and, by early 1984, had become major suppliers of pornographic material to that industry.

When I served as the chairman of the Subcommittee on Family and Human Services of the Senate Committee on Labor and Human Resources, I had the opportunity to hear testimony that documented—and this is important from the governmental and social sense—that documented the terrible consequences of widespread and growing breakdown in values.

At oversight hearings on broken families, and at a series of hearings on the reauthorization legislation for the Child Abuse Prevention and Treatment and Adoption Reform Act, the evidence was clear that the breakdown in values is a sensitive and complex social problem, one that is a true crisis for our country and for us as individuals, and pornography clearly contributes to it.

I am particularly alarmed when I compare the differences in society 20 years ago and today regarding a fundamental breakdown in values. I first noticed these differences when I returned to American society after more than 7½ years as a prisoner of war in North Vietnam.

Things that were considered totally unacceptable for public presentation when I left, were common sights when I came home. During that same transition period, social well-being and family integrity began to disintegrate, and rates of divorce and rates of illegitimate births began to increase.

I find remarkable the regressive changes in society, of which pornography is an integral part.

The adoption of sexual permissiveness as a way of life and as a norm has poisonous and fatal consequences for the family and other social institutions which are necessary for the maintenance of civilization, nationhood and well-being. In the process, the right of the individual, to the pursuit of happiness, a right guaranteed by the U.S. Constitution, is being destroyed.

As a member of the Subcommittee on Juvenile Justice of the Senate Committee on the Judiciary, of which Senator Specter is the chairman, I heard testimony on the subject of the effects of pornography indicating that pornography is a vice that destroys values, contributes to the breakdown of the family, and has a negative effect on all society—men, women, and children.

Evidence was presented that sexually exploited persons are unable to develop healthy, affectionate relationships in later life; that they may have sexual dysfunction and that they become victims in a continuous cycle of abuse.

The crass commercial exploitation of human sexuality by the multibillion-dollar pornography business is an affront to every individual and to every community that strives to maintain a decent society and to protect its citizens and their fundamental freedoms.

Innovations in the methods of distributing pornography, particularly in the areas of cable television and interstate telephone service, make it imperative that Congress address the gaps or ambiguities in existing law, as Senator Helms has indicated.

The ease with which children may obtain access to pornography via television and the "dial-it" sex services is well documented. In my own State of Alabama, a news article appearing in the Montgomery Advertiser and Journal, on June 5, 1983, listed story after story of how children as young as 6 years old have been indiscriminately exposed to pornographic messages and images through dial-a-porn services against the will of and without the consent of their parents. This problem continues unabated; indeed, it is growing.

Without objection, I will place a copy of the Journal article in the record following my statement.

In view of the seriousness of the factors involved, the present abdication of Government supervision over the public channels of communication cannot be justified. Today's hearing will examine S. 1090, which amends title 18, United States Code, section 1464 and title 47, United States Code, section 223(b).

S. 1090 would supplement and clarify existing Federal law relating to control over the use of cable television and interstate telephone services (18 U.S.C. sections 1462, 1464, 1465, and 47 U.S.C. sections 223 and 559). It underscores the Federal Government's current prohibition against the use of interstate channels of communication to transport obscene materials.

I look forward to hearing the testimony of our witnesses. I will now place in the record a copy of S. 1090, and also a copy of the Executive comment on S. 1090 prepared by the Federal Communications Commission.

There being no objection, these items will be placed in the hearing record.

[Aforementioned material follows:]

99TH CONGRESS
1ST SESSION

S. 1090

To amend section 1464 of title 18, United States Code, relating to broadcasting obscene language, and for other purposes.

IN THE SENATE OF THE UNITED STATES

MAY 7 (legislative day, APRIL 15), 1985

Mr. HELMS (for himself, Mr. EAST, and Mr. DENTON) introduced the following bill; which was read twice and referred to the Committee on the Judiciary

---

A BILL

To amend section 1464 of title 18, United States Code, relating to broadcasting obscene language, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Cable-Porn and Dial-a-Porn Control Act".

SEC. 2. (a) Section 1464 of title 18, United States Code, is amended to read as follows:

"§ 1464. Distributing obscene material by radio or television

"(a) Whoever utters any obscene, indecent, or profane language, or distributes any obscene, indecent, or profane

material, by means of radio or television, including cable television, shall be fined not more than $50,000 or imprisoned not more than two years, or both.

"(b) As used in this section, the term 'distributes' means to send, transmit, retransmit, telecast, broadcast, or cablecast, including by wire or satellite, or produce or provide such material for distribution.

"(c) Nothing in this section is intended to interfere with or preempt the power of the States, including the political subdivisions thereof, to regulate obscene, indecent, or profane language or material, of any sort, in a manner which is not inconsistent with this section.".

(b) The analysis of chapter 71 of title 18, United States Code, is amended by deleting "1464. Broadcasting obscene language." and inserting in lieu thereof "1464. Distributing obscene material by radio or television.".

SEC. 3. (a) Subsection (b) of section 223 of the Communications Act of 1934 (47 U.S.C. 223) is amended to read as follows:

"(b)(1) Whoever—

"(A) in the District of Columbia or in interstate or foreign communication, by means of telephone, makes (directly or by recording device) any comment, request, suggestion, or proposal which is obscene, lewd, lascivi-

ous, filthy, or indecent, regardless of whether the maker of such comments placed the call, or

"(B) knowingly permits any telephone facility under such person's control to be used for any purpose prohibited by subparagraph (A),

shall be fined not more than $50,000 or imprisoned not more than six months, or both.

"(2)(A) In addition to the criminal penalties under paragraph (b)(1), whoever, in the District of Columbia or in interstate or foreign communication, violates paragraph (b)(1)(A) or (b)(1)(B) for commercial purposes shall be subject to a civil fine of not more than $50,000 for each violation. For purposes of this paragraph, each day of violation shall constitute a separate violation.

"(B) A fine under this paragraph may be assessed either—

"(i) by a court, pursuant to a civil action by the Commission or any attorney employed by the Commission who is designated by the Commission for such purpose, or

"(ii) by the Commission, after appropriate administrative proceedings.

"(3)(A) Either the Attorney General or the Commission, or any attorney employed by the Commission who is designated by the Commission for such purpose, may bring suit in

a district court of the United States to enjoin any act or practice which allegedly violates paragraph (b)(1) or (b)(2).

"(B) Upon a proper showing that, weighing the equities and considering the likelihood of ultimate success, a preliminary injunction would be in the public interest, and after notice to the defendant, such preliminary injunction may be granted. If a full trial on the merits is not scheduled within such period, not exceeding 20 days, as may be specified by the court after issuance of the preliminary injunction, the injunction shall be dissolved by the court.".

(b) Subparagraph (A) of paragraph (1) of subsection (a) of section 223 of the Communications Act of 1934 is repealed.

(c) Subsection (c) of section 8 of the Federal Communications Commission Authorization Act of 1983 is repealed.

○

FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON D.C. 20554
July 19, 1985

IN REPLY REFER TO

Honorable Strom Thurmond
Chairman, United States Senate
Committee on the Judiciary
Washington, D. C. 20510

Dear Senator Thurmond:

Your letter of June 21, 1985 to Chairman Fowler requesting the Commission's views on S. 1090, the "Cable-Porn and Dial-a-Porn Control Act," has been referred to me for response.

Briefly summarized, S. 1090 is designed to eliminate the transmission of obscene, indecent and profane material by means of wire or radio, including satellite, cable television and telephone services. 1/ Toward this end, S. 1090: 1) expands the application of 18 U.S.C. § 1464 to explicitly include a prohibition against offensive material transmitted over both cable and broadcast television, as well as radio; and 2) institutes a broader statutory scheme of liability, penalizing all obscene or indecent communications through interstate or foreign telephonic means, thereby eliminating the defense established by 47 U.S.C. § 223(b)(2) and its complimentary FCC regulation. 2/

S. 1090 differs from Section 223(b) in several significant respects. First, S. 1090 penalizes those who utilize the telephone for obscene or indecent communications, for commercial and non-commercial purposes alike, to anyone, regardless of age 3/ or consent.

1/ 130 Cong. Rec. S. 7320 (Helms) (June 14, 1984).

2/ Enforcement of Prohibitions Against the Use of Common Carriers for the Transmission of Obscene Materials, Gen. Docket No. 83-989, 49 Fed. Reg. 24996 (June 14, 1984).

3/ Section 223(b) was narrowly tailored to prohibit obscene or indecent telephone communications for commercial purposes only to minors and nonconsenting adults. 129 Cong. Rec. H. 10560 (Bliley) (November 18, 1983); 129 Cong. Rec. S. 5789 (Kastenmeier) (November 18, 1984); 129 Cong. Rec. S. 16866 (Trible) (November 18, 1984).

It should be noted that the FCC regulation adopted on June 14, 1984, has since been set aside by the United States Court of Appeals for the Second Circuit. See Carlin Communications, Inc. v. FCC, 749 F. 2d 113 (2d Cir. 1984). On March 1, 1985, however, the Commission adopted a Second Notice of Proposed Rulemaking, 50 Fed. Reg. 10510 (1985), in this proceeding.

I. Restrictions on Broadcast and Cable Television and Radio

Inclusion of the terms "indecent" and "profane" in the context of regulating radio, television and cable television may be constitutionally impermissible. Unlike obscenity, which clearly is not accorded First Amendment protection, at least outside the privacy of one's home, 4/ it is not clear that government may restrict indecent, profane, lewd, lascivious or filthy communications which do not amount to "fighting words". Other than in the realm of broadcasting, the statutory term "indecent" has been judicially construed to mean "obscene" and we believe the courts may well continue to so limit it. 5/ Because of broadcasting's "pervasive presence" in American lives and "unique accessibility" to children, the Court in FCC v. Pacifica Foundation, 438 U.S. 726 (1978), did uphold governmental restrictions on indecent speech. 6/ The Court cautioned, however, that Pacifica represents a "very narrow decision," in that it did not involve for example, a "two-way radio conversation between a cab driver and a dispatcher . . . or closed circuit transmissions." 7/ Nor did the Court rule out the possibility that indecent transmissions could not be prohibited during periods when the audience would not likely be comprised of children. 8/ Moreover, in view of a recent ruling by the United States Court of Appeals for the Eleventh Circuit striking down a Miami city ordinance regulating the transmission of indecent material via cable television, it may be that indecency statutes, at least as applied to subscription services, are

4/ Stanley v. Georgia, 394 U.S. 557 (1969), recognized a right to possess obscene material in the privacy of one's home; however, subsequent judicial pronouncements have limited Stanley to its facts. In fact, the Court in United States v. 12,200-Ft. Reels of Super 8 mm. Film, 413 U.S. 123, 126-127 (1973), intimated that Stanley represented an aberration. See also, United States v. Orito, 413 U.S. 139 (1973).

5/ See e.g., Hamling v. United States, 418 U.S. 87, 114 (1974) (in the mailing context, the generic terms "obscene, lewd, lascivious, indecent, filthy or vile" were construed "to be limited to the sort of patently offensive representations or descriptions of that specific 'hard core' sexual conduct given as examples in Miller v. California," quoting United States v. 12,200-Ft. Reels of Super 8 mm. Film, supra at 130 n. 7).

6/ In Pacifica, the Court defined the term "indecent," as "nonconformance with accepted standards of morality."

7/ 438 U.S. at 750.

8/ Id. at note 28.

unconstitutionally overbroad. 9/ Thus, there exists serious question as to whether S. 1090's prohibition on uttering indecent speech would withstand constitutional challenge.

Even more serious doubts exist as to S. 1090's prohibition against the utterance of profane speech. While an early decision of the Supreme Court indicated that government may restrict profane speech, see Cantwell v. Connecticut, 310 U.S. 296, 309-310 (1940), more modern decisions raise substantial doubts as to whether profane speech would still be found to be outside the scope of the First Amendment protection. In Cohen v. California, 403 U.S. 15 (1971), the Court stated that offensive speech could not be prohibited unless the state could show that it was inherently likely to cause a violent reaction. We see very little likelihood that profane speech can be restricted without a showing that it amounted to "fighting words." See Chaplinsky v. New Hampshire, 315 U.S. 568 (1942). Moreover, the terms "lewd", "lascivious" and "filthy", since they presumably connote conduct less offensive than "indecent", are less likely to withstand constitutional muster.

Given the above, it would appear that serious First Amendment concerns are raised by the inclusion of profane and indecent material within the scope of S. 1090. We are of the opinion that at the very least, deletion of the term "profane" from S. 1090 would more closely conform to recent judicial pronouncements on this subject. 10/ Even if S. 1090 were upheld as to broadcast speech, it remains questionable, especially in view of the Cruz decision, whether the Pacifica rationale may justifiably be extended to a consensual service, such as cable television or telephone service. Cable television and telephone services are distinguishable from broadcasting in that they are consensual (individuals must intentionally access the information) and in a

9/ See Cruz v. Ferre, 755 F. 2d 1415 (11th Cir. 1985).

10/ The term "profane" is not defined in S. 1090. One definition of "profane" would be sacrilegious. While it had been held that the broadcast of sacrilegious or irreverent material was punishable under the Radio Act, see Duncan v. U.S., 48 F. 2d 128 (1930), more recently in the context of films, the Supreme Court held, "[u]nder the First and Fourteenth Amendments a state may not ban a film on the basis of a censor's conclusion that it is sacrilegious." Burstyn, Inc. v. Wilson, 343 U.S. 495 (1952).

sense private. 11/ In considering regulatory measures that may infringe upon speech, the nature of each medium must be considered separately, for "each medium of expression presents special First Amendment problems." 12/

Even if the courts were to extend Pacifica's rationale to allow governmental regulation of indecent and profane speech over radio or television, we are of the opinion that restrictions on such speech must be reasonable as to time, place, and manner. See Cox v. New Hampshire, 312 U.S. 569 (1941). The blanket prohibition against transmission of generically offensive material by broadcast, cable television and telephone service imposed by S. 1090, without any limitation, might not be considered a "reasonable time, place and manner" restriction. By flatly prohibiting the presentation of such offensive material, adults, as well as minors, are denied access. In Butler v. Michigan, 352 U.S. 380 (1957), where the Court invalidated a statute which barred adults' access to materials determined to have a potentially deleterious influence on children, it explained as follows:

> The State insists that, by thus quarantining the general reading public against books not too rugged for grown men and women in order to shield juvenile innocence, it is exercising its power to promote the general welfare. Surely, this is to burn the house to roast the pig.
>
> The incidence of this enactment is to reduce the adult population . . . to reading only what is fit for children.

Id. at 383. The complete prohibition against the broadcast of indecent and profane speech contained in Section 2 of S. 1090 may have the effect of reducing the adult population to that which is appropriate for children, in violation of Butler v. Michigan, supra.

11/ Phone conversations have been viewed to be private matters and thus safeguarded by the Fourth Amendment. See Katz v. United States, 389 U.S. 347 (1967); Berger v. New York, 388 U.S. 41 (1967); see also 18 U.S.C. §§ 2510-2520 (one of the purposes of the laws on interception of wire and oral communications is to protect the privacy of conversations and to protect unlawful invasions of privacy). Additionally, cable television may be considered private because in order to receive "off-color" material, consumers must enter a private contractual arrangement and pay a premium fee.

12/ FCC v. Pacifica Foundation, supra at 748.

II. Restrictions on Telephone Transmissions

With respect to Section 3 of S. 1090, which prohibits the use of the telephone or telephone facilities for the transmission of obscene, lewd, lascivious, filthy, or indecent" comments, we have reservations similar to those expressed above. We believe it quite likely that a court would construe the language following the term "obscene" as being effectively synonymous with that term. 47 U.S.C. § 223(b), which prohibits the transmission of obscene or indecent messages by telephone was challenged in the United States Court of Appeals for the Second Circuit, on inter alia, constitutional grounds. 13/ Since the Second Circuit remanded the FCC's complementary regulation for further consideration without reaching the constitutionality of § 223(b), questions as to the extent to which Congress may regulate offensive telephone communications are yet to be resolved.

We also suggest that S. 1090 clarify whether common carriers may be subject to liability for "permit[ting] any telephone facility under such person's control to be used" for such purposes as are prohibited by Section 3 of S. 1090. Whereas the legislative history of Section 223(b) is replete with statements of intent to exempt from liability common carriers that merely provide telephone service to "dial-a-porn" message providers, the remarks accompanying S. 1090 do not contain any reference to whether common carriers are to be held liable for the use of their facilities for purposes prohibited by S. 1090. We note that the inclusion of the term "knowingly" in Section 3(b)(1)(B) may have been intended to exculpate common carriers, 14/ but we would recommend clarification in this regard.

III. Miscellaneous Concerns

No matter how the questions that have been raised with respect to the regulation or prohibition of "indecency" and "profanity" are ultimately resolved, we would strongly recommend that the Department of Justice be entrusted with the administration of S. 1090. Under relevant Supreme Court decisions, see e.g., Miller v. California, 413 U.S. 15 (1973), determinations of obscenity and indecency must be based upon local community

---

13/ See Carlin Communications v. FCC, 749 F. 2d 113 (2d Cir. 1984).

14/ In Pacific Bell v. Sable Communications of California, Inc., No. CV 84-469 AWT, slip op. at 5-6 (C.D. Cal. Feb. 13, 1984), the Court addressed the possibility of common carrier's liability under Section 223(b) in the dial-a-porn context. The Court held that no "reasonable possibility" exists that a common carrier "will be subject to liability, either criminal or civil, under [Section 223]." The Court emphasized the difficulty of establishing the common carrier's "knowledge" of the dial-a-porn messages, particularly since the messages are changed frequently.

standards rather than national standards. It is most difficult for this Commission to determine what the appropriate standard is in communities throughout the country, as we noted in the Notice of Inquiry, Gen. Docket No. 83-989:

> It becomes . . . difficult if the proposed determiner of obscenity is a Washington federal agency -- here, this Commission. Although we have made such determinations in cases like Pacifica, we ask whether we ought to limit the category of cases where we so act. If we do make such a determination, would the Commission have to admit evidence of the local community standard? Which community's standard would apply in a dial-a-porn situation? Is it the community where the statements are uttered, New York City in this instance, or a community where they are heard? Does the Commission have the discretion to choose any of these communities. Are there certain procedures that we would be required to follow in making our determination? We invite comments on these queries specifically and on the practical problems generally of determining what is obscene. More fundamentally, we invite comments on the desirability of having the Commission become an arbiter of obscenity. Specifically, we question whether this ought to be part of our function and whether it is wise or feasible to devote the amount of Commission time and resources that would be required to make the multitude of determinations that would undoubtedly be requested. Finally, we ask whether the availability of alternative procedures (e.g., prosecutions in federal or state courts) should affect our decision.

The requirement in Section 3 that this Commission institute action against those who violate S. 1090 would place substantial burdens on our limited resources. As the Justice Department has the capability and the resources to initiate litigation anywhere in the nation, use of their processes would be far more efficient and cost-effective than entrusting the FCC with enforcement responsibilities in this case.

While the Commission has not taken a position with regard to the public policy merits of S. 1090, it seems apparent to us that, with the changes described above, the legislation should prove effective to prevent the use of telecommunications facilities for "dial-a-porn" type activities. We suggest that it may be useful for the Committee to consider this measure in tandem with S. 1305, the "Computer Pornography and Child Exploitation and

Prevention Act of 1985." Joint consideration may help ensure a comprehensive solution to the problem of how to prevent the use of interstate telecommunications facilities for the transmission, transportation or distribution of pornographic material.

We appreciate the opportunity to present the Commission's views on this important matter and will be delighted to provide you with any further assistance you might require with respect to this legislative initiative.

Sincerely yours,

Jack D. Smith
General Counsel

Senator DENTON. Our first witness today is the Honorable Jack D. Smith, general counsel for the Federal Communications Commission. Mr. Smith has been with the Commission since 1974 and was elevated to his current position in October 1984.

I welcome you to today's hearing, Mr. Smith. Your complete written statement will be included in the record. Because of time constraints, you are requested to confine your oral testimony to 15 minutes.

STATEMENT OF JACK D. SMITH, GENERAL COUNSEL, FEDERAL COMMUNICATIONS COMMISSION

Mr. SMITH. Very well. Good morning, Chairman Denton. It is a pleasure to be here before you today again to present the views of the FCC on S. 1090. I will abbreviate my testimony.

As you are well aware, the FCC has been grappling with the problem of obscene and indecent transmissions over telecommunications facilities for some time. Although we initiated a formal inquiry into the problem in September 1983, Congress decided to amend section 223 of the Communications Act. This amendment directed the Commission to promulgate a regulation restricting minors' access to obscene or indecent telephone message services. Compliance with the FCC regulation was meant to give dial-a-porn service providers a defense to prosecution.

Although we attempted to implement this statutory amendment by promulgating a regulation restricting dial-a-porn operations to late evening hours or requiring payment by a credit card only, the second circuit set aside our regulation and remanded the proceeding to see if we could devise an alternative less likely to restrict adults' access to the dial-a-porn services. So, now, we are trying to evaluate comments that we have received in response to our second notice of proposed rulemaking in this proceeding.

While the extent to which Congress may regulate offensive telephone communications has yet to be resolved, it seems clear that the courts will require any regulation in this area to be as unintrusive as possible. Because this is such a complicated and serious matter, the Commission is devoting considerable time and attention to it.

Senator DENTON. If you will permit a comment, "unintrusive" in what way? Isn't pornography "intrusive"? It seems to me that you emphasize the wrong concerns, but please continue.

Mr. SMITH. I think there is a difference in view between some of the people on Capitol Hill and the judges that sit on the second circuit. When the courts are speaking of unintrusive, they are really talking about the protection of 223(b), which was written to protect children from viewing these materials. And they want to make sure that we have done everything that we can to make sure that the children are protected, and we do not abrogate the rights of any adults who might want to view the materials. I think they felt at the time that we had not examined thoroughly enough different options to make sure that adults could have access to the materials.

Senator DENTON. So the court seemed to indicate that what we need to do is protect children against pornographic materials?

Mr. SMITH. That is correct.

Senator DENTON. The court did not focus on the issue of dissemination of these materials to adults, and did not address the fact that in some cases pornography has a harmful effect even on adults?

Mr. SMITH. That is a fair statement. Our focus and the attention of the court was on the effects on children, not on adults.

Senator DENTON. Well, there is a voice screaming out there, not from the conservative side, but from the liberal side, saying "stop oversexing America." According to the findings, pornography does change the attitudes of husbands toward wives and of wives toward husbands in a negative way and undermines the marital relationship. I think there is enough evidence about the harmful effects of pornography on adults, that the question should be examined.

Mr. SMITH. We do agree with your view on the legality of the restrictions of obscene utterances over the telephone, as contained in S. 1090 and as you have stated today. We do have some concerns, though, about the defensability of the restrictions on the transmission of lewd, lascivious, filthy, or indecent comments.

After having reviewed the court cases, we believe it quite likely that a court would construe those terms as being effectively synonymous with "obscene." The Supreme Court has construed the terms "obscene, lewd, lascivious, indecent, filthy" or "vile" to be limited to patently offensive representations or descriptions of specific hard-core sexual conduct.

Accordingly, it is not clear that the courts will give independent effect to each term following "obscene." As to the letter you read from Jack Anderson and the description of the program that he saw in the hotel, I would surmize from his description that that program probably would fall under the definition of obscene and hard core, and that might be something you could limit.

Things less than that which would be called indecent or vile might not be something that we would get away with limiting—the FCC would get away with limiting or Congress would get away with limiting.

Senator DENTON. Well, what about the point that Senator Helms made that the law can be more restrictive with respect to materials which can be disseminated to children.

Mr. SMITH. That is true, I think, primarily in the case of broadcasting. I am not aware of any cases that make that distinction outside the broadcasting area. That case was an FCC case, and the FCC took it to the Supreme Court and defended the principle.

Senator DENTON. When you say broadcasting, you mean radio broadcasting?

Mr. SMITH. Radio or television broadcasting. The idea there was that this is a medium that is so pervasive, it is in the ether; it is everywhere around us.

Senator DENTON. So you mean that transmission by cable TV within a city or a number of cities is not considered broadcasting, and therefore, regarding exposure to children of certain materials, the law should be less restrictive for cable TV?

Mr. SMITH. Yes. I think that is the way the courts are coming down on this right now. There is a big difference between broadcasting, which is all around us and all-pervasive, and cable televi-

sion, which you have to specially subscribe to and you pay a monthly fee for.

Senator DENTON. Are you saying that if pornography reaches, or can reach, 100 million people in 10 or 15 million homes via broadcasting, there is a certain set of rules respecting exposure of children, but if the program only reaches a million homes, via cable TV, the rules change and the child can be exposed to objectionable material? I do not see the logic to that. I am not a lawyer.

Mr. SMITH. I had better be careful how I answer that because you may be approaching the stage where cable will reach 100 million homes itself. And the distinction that the courts have been drawing—and I remind you this is not the FCC; this is the courts—is that this is a service which you subscribe to.

And most of the pornography itself, if there is any pornography, is on what they call premium channels. So while you may get your regular channels if you live here in Virginia, for example, maybe you will get 30 or 60 channels of regular programming, if you want the premium programming, you have to pay an extra $7 or $8 a month for that. A homeowner can decide that he does not want to subscribe to that channel because it does have objectionable programming on it.

In addition, we have—and Virginia is a good example, they have put out program guides that list the programming a month ahead of time and they list whether it is an "R" or an "X" or whatever, so the parents have an opportunity to see that.

On top of that, the courts found it distinctive that in 1984 Congress passed the new Cable Act which provided that any subscriber who wanted it could have a lock box provided to him by the cable television operator, and that lock box would be operable so that you could make sure that your children did not have access to any channel that had the possibility of having obscene and indecent language on it.

So I think the courts are probably right when they say that there is a big difference between the way cable television operates and the way over-the-air television and radio broadcasting operates.

Senator DENTON. I am glad to hear your opinion and your analysis of the courts' view. Please proceed.

Mr. SMITH. Getting back to the telephones, it may be desirable in this bill to clarify that common carriers are not subject to liability for permitting any telephone facility under such person's control to be used for the purposes prohibited by section 3 of S. 1090. Reviewing the legislative history of section 223(b), it is replete with statements of intent to exempt from liability common carriers that merely provide telephone service to dial-a-porn operators.

This was confirmed by the Central District Court of California, which emphasized the difficulty of establishing the common carrier's knowledge of frequently changed dial-a-porn messages. The court held that no reasonable possibility exists that a common carrier will be subject to liability, either criminal or civil, under section 223.

Finally in the telephone area, a blanket prohibition against transmission of generically offensive material by telephone——

Senator DENTON. Excuse me. In your written statement you stated: "S. 1090 does not state that common carriers will not be

held liable for the use of their facilities for indecent or obscene purposes," which deals precisely with that which we were addressing before regarding exposure to children. Why did you leave out in your oral statement that sentence?

Mr. SMITH. I thought that was redundant with the first sentence, which said it may be desirable to clarify that they are not subject to liability. But I will stand by that last sentence. We do believe that it would be impractical to hold the common carriers liable, and that the legislative history, at a minimum, should make it clear because if that is not done, we foresee a lot of litigation on that point—tying up what you are trying to achieve here.

A blanket prohibition against transmission of generically offensive material by telephone may also violate *Butler* v. *Michigan*. In *Butler*, the Supreme Court invalidated a statute which barred adults' access to materials determined to have a potentially deleterious influence on children because it would have the effect of reducing the adult population to reading only what is fit for children.

Let me turn to the restrictions now on broadcast cable television and radio. As currently drafted, this legislative proposal would also expand the prohibition against obscene, indecent or profane material found in 18 U.S.C. 1464 to cover cable television.

As first amendment jurisprudence stands now, the restrictions on obscene material contained therein would probably withstand judicial scrutiny. The Supreme Court has consistently held that obscene speech is not entitled to first amendment protection outside the privacy of one's home.

The restrictions on indecent or profane material contained in this section are, however, another matter. In the *Pacifica* case, which you and I have just talked about, the Supreme Court upheld restrictions on indecent material broadcast over television or radio.

However, the Court emphasized that *Pacifica* was a very narrow decision which only dealt with indecent material broadcast over the radio when children were likely to be listening. It did not deal with a total ban on indecent material even during periods when the audience would not likely be comprised of children.

A blanket prohibition against the broadcast of indecent material might not be considered a reasonable time, place, and manner restriction, since adults, as well as minors, would be denied access. Moreover, as we discussed above with regard to restrictions on telephones——

Senator DENTON. I want to be sure I comprehend what you are saying. Since I am not a lawyer, let me ask you a question to clarify your testimony. You mention as a key consideration "when children are likely to be listening." What does "likely" mean? Does that mean a 50-to-50 chance, or 4-to-1 chance? Is a group of 5,000 children less worthy of being protected than a group of 50,000, for example?

Mr. SMITH. I think the protection of children will weigh very heavily in any court review of these legislative proposals.

Senator DENTON. You mentioned the ability to be able to lock the cable channel which presumably assumes that only an adult will be able to unlock the channel. This has been discussed frequently. From the parent's point of view, you can lock out an offending, commercial channel if you want to, but the law may still prohibit

the transmission of certain materials, whether or not "lock boxes" are provided.

Mr. SMITH. I think what Congress is talking about in the 1984 Cable Act is a special provision to make sure that cable operators would provide these lock boxes. We have not gone so far as making sure that your local broadcaster will provide them. In the legislative history, I think that the legislators were concerned that the lock boxes would not be available unless the cable operator provided them.

Even if a prohibition on indecent speech on broadcast television is valid, a similar provision applicable to cable television, as we have already discussed, is not necessarily valid.

In considering regulatory measures that may infringe upon speech, the nature of each medium must be considered separately, for as stated in *Pacifica,* each medium of expression presents special first amendment problems.

This points up the area of problem that I have been talking about. Last March, in *Cruz* v. *Ferre,* the U.S. Court of Appeals for the 11th Circuit struck down a Miami city ordinance which regulated the transmission of indecent material over cable television. They said that was impermissible with the first amendment. They did not touch on the transmission of obscene materials; they just talked about indecent materials.

They found a lot of difference between cable television and broadcast television, which we have already discussed—the lock boxes, the ability to subscribe, the programs announced in advance.

Thus, we are afraid that if the *Cruz* rationale is the one that is going to be adopted by the U.S. courts, S. 1090's prohibitions on uttering indecent speech over cable television will not withstand constitutional challenge.

Senator DENTON. What is the efficacy of this approach? Whether programs are obscene, indecent, or profane, are not the originators the ones who benefit financially? If the Government is to protect children—why shouldn't the onus be placed on the profiteers rather than on the parent?

Mr. SMITH. That has not seemed to be the approach Congress has taken so far.

Senator DENTON. Nor the courts.

Mr. SMITH. Nor the courts. I think what the onus has been so far is that the cable operators are going to be responsible——

Senator DENTON. I do not mean to be rude and interrupt, but we have all sorts of requirements in the environmental field which place the responsibility for harm on the profiting company, shifting the burden away from the consumer and in many instances imposing a standard of strict liability on the commercial enterprise.

Here, we are talking about something with an even greater potential for causing harm. It does not seem logical to treat the two situations differently, by shifting the burden to the consumer here. I am not a lawyer, but I am a logician. What you describe does not seem logical to me.

Mr. SMITH. I can understand that logic. That is not the way the logic of the courts has been going so far.

Senator DENTON. Go ahead.

Mr. SMITH. There may also be some problems concerning the bill's prohibition against the utterance of profane speech. While an early decision of the Supreme Court in 1940 had indicated that Government may restrict profane speech, more modern decisions raise substantial doubts as to whether profane speech would still be found to be outside the scope of first amendment protection.

Although it is not defined in S. 1090, the term "profane" has been defined elsewhere to mean sacrilegious. While the broadcast of sacrilegious or irreverent material was punishable under the old Radio Act, the Supreme Court has held since that under the first and fourteenth amendments, a State may not ban a film on the basis of a censor's conclusion that it is sacrilegious.

As to the terms "lewd," "lascivious" and "filthy," since they presumably connote conduct less offensive than indecent, we think they are probably less likely to withstand constitutional review.

In view of the foregoing, it may be advisable to revise S. 1090 in the following manner. You might want to consider retaining the obscenity prohibitions, limit the indecency prohibitions to the broadcasting area only, and delete the use of the words "profane, lewd, lascivious, and filthy" from this section.

We think if this is not acceptable, it may be more helpful to make it clear that even if one or more of the words following obscene are protected speech, those terms are severable. This revision may ensure that the entire statute does not become struck down as constitutionally infirm and you can at least save those parts that are consistent with the court cases to date.

Senator DENTON. When you mention "broadcasting," again, you refer to broadcasting in the conventional sense. You advised me that cable, even though it is not considered broadcasting, may eventually reach more homes than broadcasting—you know, 100 million people——

Mr. SMITH. I think the number is about 30 million now, and growing.

Senator DENTON. Is the distinction then between "cable" and "broadcasting" becoming logically senseless?

Mr. SMITH. No. I think it is not necessarily the reach. The pervasiveness becomes less serious an issue, but they would still fall back on the idea that you have to subscribe, and on top of subscribing to the original channels, you have to subscribe again and pay more money for the premium channels. That is going to be a distinction that is not going to fail, no matter how many homes are reached.

Senator DENTON. Go ahead.

Mr. SMITH. No matter how the foregoing questions are ultimately resolved, we would strongly recommend clarification of S. 1090 generally along the following lines. First, this legislation should specify whether the standard to be applied when making determinations of obscenity or indecency is that of the community where the allegedly obscene or indecent statement is uttered or that of the community where it is heard.

This problem arises both with respect to the provisions of S. 1090 applicable to telephone as well as to broadcast and cable transmissions. For example, if a person in Utah calls a New York dial-a-

porn service, should the Utah standard govern or should the New York standard govern?

Similarly, if programming is transmitted to numerous cable head-ins throughout the country, should the standard of the community from which it is transmitted or the standard of the community where it is received apply?

While it is possible to operate using individual community standards, as is the situation under the libel laws, this would create some problems for interstate service providers knowing in advance to which standards they would be held liable.

That is a particular area that if you decide to delve into, we would like to provide you some assistance on; we think we could be helpful there. We are not saying that is not doable. We think it is doable, if you want to do that.

Second, we believe that the Department of Justice should be entrusted with the entire administration of S. 1090. Since the Attorney General represents the Government in all Federal court proceedings, the U.S. attorneys for the various districts are more familiar with the local standards and have attorneys available to initiate such litigation.

Use of the processes available to the Justice Department would be far more efficient and cost-effective than the requirement in section 3 that this Commission institute action against those who violate S. 1090.

We at the FCC will be pleased to provide any additional assistance you might require with respect to this legislative proposal. While the Commission has not taken a position with regard to the public policy merits of S. 1090, it seems apparent to us that this legislation, with the changes described above, should help to deter the use of interstate telecommunication facilities for the transmission of obscene or indecent materials.

Thank you again for the opportunity to present the views of the FCC, and any other questions that you have, I will be happy to try to answer.

Senator DENTON. Suppose Congress required by law that the Justice Department have the primary jurisdiction over and responsibility for the areas we have discussed. Would then the FCC cooperate with the Department of Justice in specific terms, such as providing sufficient FCC attorneys to work with the Department of Justice attorneys in pressing the cases?

Mr. SMITH. Well, I think we have a pretty good track record of cooperation with them, and I think we would be more than happy to provide whatever help we could. Our problem is that as far as attorneys go, they have lots more than we do.

For example, I have 41 here in the General Counsel's Office at the FCC, and I do not have any out there in the hinterlands where the communities are, although I know the Justice Department has got them all over, with U.S. attorneys in every State. I think they are Johnny-on-the-spot, and more able to take care of these kinds of problems than we are, located here in the District.

Senator DENTON. Senator Helms submitted a question which might be relevant at this point. He asks if the Federal courts continue to make it impossible, as a practical matter, to restrict obscene matter on cable TV and in interstate telephone service,

would the FCC support legislation to take away Federal court jurisdiction over this subject matter.

Mr. SMITH. Do I understand the question to be whether the FCC would support legislation to take away Federal court jurisdiction over first amendment questions?

Senator DENTON. The question places an emphasis on local control and on the removal of Federal court jurisdiction which restricts that control.

Mr. SMITH. I think as I just said that the community standard is what is important. The FCC does not believe that there should be any nationwide standard, so we would have no objection to the State courts taking care of this.

Senator DENTON. It seems as if that ends up resolving itself after a Federal district court jury finds something objectionable, which would be a reflection of the community, in a sense. It is then appealed to a Federal appellate court; the Federal appellate court overrules the district court.

Mr. SMITH. Yes. The constitutional questions are most likely to be handled by the district courts, and they are appealable to the circuit courts. And I think you are correct that there is probably no way to get the Federal court system out of this process. I think it is a product of the Constitution.

Senator DENTON. Are you finished with your statement?

Mr. SMITH. Yes, sir. Thank you very much.

Senator DENTON. Thank you. I do want to ask you some more questions, Mr. Smith.

Did not the Supreme Court in the *Pacifica* case refer in the footnotes to the inappropriateness of nudity on television, as well as upholding the indecency standard for radio?

Mr. SMITH. I think that is correct.

Senator DENTON. Why should not these proscriptions apply to cable TV as well?

Mr. SMITH. I guess it keeps going back to the same thing that we have talked about.

Senator DENTON. Please continue.

Mr. SMITH. There is a big distinction between cable and television, and the courts have been very quick to grasp onto that distinction and I do not think they are going to walk away from it now.

Senator DENTON. They cannot walk away from it, but we——

Mr. SMITH. I do not believe there is a single court case that finds that cable television is the same as broadcasting.

Senator DENTON. All right. We have other questions. In the interest of time, we will submit them to you in writing and ask that you respond as soon as you can.

Mr. SMITH. Thank you very much, Senator.

Senator DENTON. Thank you, Mr. Smith.

[The prepared statement of Mr. Smith follows:]

PREPARED STATEMENT OF JACK D. SMITH

CHAIRMAN DENTON AND MEMBERS OF THE SUBCOMMITTEE, I APPRECIATE THE OPPORTUNITY TO COME BEFORE YOU TODAY AND PRESENT THE FEDERAL COMMUNICATIONS COMMISSION'S VIEWS ON S. 1090, THE "CABLE-PORN AND DIAL-A-PORN CONTROL ACT." THIS LEGISLATION PROPOSES TO ELIMINATE THE TRANSMISSION OF OBSCENE, INDECENT, PROFANE, LEWD, LACIVIOUS AND FILTHY MATERIAL BY MEANS OF WIRE OR RADIO, INCLUDING SATELLITE, CABLE TELEVISION, AND TELEPHONE SERVICES, BY: 1) EXPANDING THE PROHIBITION CONTAINED IN 18 U.S.C. § 1464 AGAINST TRANSMITTING OFFENSIVE MATERIAL OVER BROADCAST FACILITIES TO ENCOMPASS TRANSMISSIONS OVER CABLE TELEVISION; AND 2) PROHIBITING ALL OBSCENE OR INDECENT INTERSTATE TELEPHONE COMMUNICATIONS, THEREBY ELIMINATING THE DEFENSE ESTABLISHED BY 47 U.S.C. § 223(B)(2) AND ITS COMPLIMENTARY FCC REGULATION.

AS YOU ARE WELL AWARE, THE FCC HAS BEEN GRAPPLING WITH THE PROBLEM OF OBSCENE AND INDECENT TRANSMISSIONS OVER TELECOMMUNICATIONS FACILITIES FOR SOME TIME. ALTHOUGH WE INITIATED A FORMAL INQUIRY INTO THE PROBLEM IN SEPTEMBER OF 1983, CONGRESS DECIDED TO AMEND SECTION 223 OF THE COMMUNICATIONS ACT. THIS AMENDMENT DIRECTED THE COMMISSION TO PROMULGATE A REGULATION RESTRICTING MINORS' ACCESS TO OBSCENE OR INDECENT TELEPHONE MESSAGE SERVICES. COMPLIANCE WITH THE FCC REGULATION WAS MEANT TO GIVE "DIAL-A-PORN" SERVICE PROVIDERS A DEFENSE TO PROSECUTION. ALTHOUGH WE ATTEMPTED TO IMPLEMENT THIS STATUTORY AMENDMENT BY PROMULGATING A REGULATION RESTRICTING "DIAL-A-PORN" OPERATIONS TO LATE EVENING HOURS OR REQUIRING PAYMENT BY CREDIT CARD ONLY, THE SECOND CIRCUIT SET ASIDE OUR REGULATION AND REMANDED THE PROCEEDING TO SEE IF WE COULD DEVISE AN AN ALTERNATIVE LESS LIKELY TO RESTRICT ADULTS' ACCESS TO "DIAL-A-PORN" SERVICES. SEE CARLIN COMMUNICATIONS INC. V. FCC, 749 F.2D 113 (2D CIR. 1984). WE ARE CURRENTLY EVALUATING COMMENTS RECEIVED IN RESPONSE TO OUR SECOND NOTICE OF PROPOSED RULEMAKING

58-804 0 - 86 - 2

IN THIS PROCEEDING. ALTHOUGH THE EXTENT TO WHICH CONGRESS MAY REGULATE OFFENSIVE TELEPHONE COMMUNICATIONS HAS YET TO BE RESOLVED, IT SEEMS CLEAR THAT THE COURTS WILL REQUIRE ANY REGULATION IN THIS AREA TO BE AS UNINTRUSIVE AS POSSIBLE. BECAUSE THIS IS SUCH A COMPLICATED AND SERIOUS MATTER, THE COMMISSION IS DEVOTING CONSIDERABLE TIME AND ATTENTION TO IT.

AS CURRENTLY DRAFTED, S. 1090 DIFFERS FROM SECTION 223(B) IN A NUMBER OF SIGNIFICANT RESPECTS. FIRST, S. 1090 PENALIZES, WITHOUT EXCEPTION, THOSE WHO UTILIZE THE TELEPHONE FOR OBSCENE OR INDECENT COMMUNICATIONS. UNLIKE SECTION 223(B), WHICH IS NARROWLY TAILORED TO PROHIBIT OBSCENE OR INDECENT TELEPHONE COMMUNICATIONS FOR COMMERCIAL PURPOSES ONLY TO MINORS AND NON-CONSENTING ADULTS, S. 1090 BROADENS THE SCOPE OF THIS SUBSECTION TO COVER NON-COMMERCIAL AS WELL AS COMMERCIAL COMMUNICATIONS OF THIS NATURE TO ANYONE, REGARDLESS OF AGE OR CONSENT. WHILE S. 1090 CERTAINLY SIMPLIFIES THE REGULATION OF "DIAL-A-PORN" SERVICES, IT ALSO RAISES A NUMBER OF LEGAL CONCERNS WHICH I WILL NOW ADDRESS.

WHILE WE ARE NOT TROUBLED ABOUT LEGALITY OF THE RESTRICTIONS ON OBSCENE UTTERANCES OVER THE TELEPHONE CONTAINED IN THIS LEGISLATIVE PROPOSAL, WE ARE CONCERNED ABOUT THE DEFENSIBILITY OF THE RESTRICTIONS ON THE TRANSMISSION OF "LEWD, LASCIVIOUS, FILTHY, OR INDECENT" COMMENTS. WE BELIEVE IT QUITE LIKELY THAT A COURT WOULD CONSTRUE THOSE TERMS AS BEING EFFECTIVELY SYNONYMOUS WITH "OBSCENE". IN UNITED STATES V. 12,200-FT. REELS OF FILM, 413 U.S. 123, 130 AT N. 7 (1973), AND HAMLING V. UNITED STATES, 418 U.S. 87, 114 (1974), THE SUPREME COURT CONSTRUED THE TERMS "OBSCENE, LEWD, LASCIVIOUS, INDECENT, FILTHY OR VILE" TO "BE LIMITED TO THE SORT OF PATENTLY OFFENSIVE REPRESENTATIONS OR DESCRIPTIONS OF SPECIFIC 'HARD CORE' SEXUAL CONDUCT." ACCORDINGLY, IT IS NOT CLEAR THAT THE COURTS WILL GIVE INDEPENDENT EFFECT TO EACH TERM FOLLOWING "OBSCENE."

IT MAY BE DESIRABLE TO CLARIFY THAT COMMON CARRIERS ARE NOT SUBJECT TO LIABILITY FOR "PERMIT[TING] ANY TELEPHONE FACILITY

UNDER SUCH PERSON'S CONTROL TO BE USED" FOR THE PURPOSES PROHIBITED BY SECTION 3 OF S. 1090. THE LEGISLATIVE HISTORY OF SECTION 223(B) IS REPLETE WITH STATEMENTS OF INTENT TO EXEMPT FROM LIABILITY COMMON CARRIERS THAT MERELY PROVIDE TELEPHONE SERVICE TO "DIAL-A-PORN" MESSAGE PROVIDERS. THIS WAS CONFIRMED IN PACIFIC BELL V. SABLE COMMUNICATIONS OF CALIFORNIA, INC., CIVIL NO. 84-469 (C.D. CAL. FEB. 13, 1984), WHERE THE COURT, EMPHASIZING THE DIFFICULTY OF ESTABLISHING THE COMMON CARRIER'S "KNOWLEDGE" OF FREQUENTLY CHANGED "DIAL-A-PORN" MESSAGES, HELD THAT NO "REASONABLE POSSIBILITY" EXISTS THAT A COMMON CARRIER "WILL BE SUBJECT TO LIABILITY, EITHER CRIMINAL OR CIVIL, UNDER [SECTION 223]." S. 1090 DOES NOT STATE THAT COMMON CARRIERS WILL NOT BE HELD LIABLE FOR THE USE OF THEIR FACILITIES FOR INDECENT OR OBSCENE PURPOSES, AND YOU MAY WANT TO PROVIDE CLARIFICATION ON THIS POINT.

FINALLY, A BLANKET PROHIBITION AGAINST TRANSMISSION OF GENERICALLY OFFENSIVE MATERIAL BY TELEPHONE MAY VIOLATE BUTLER V. MICHIGAN, 352 U.S. 380 (1957). IN BUTLER, THE SUPREME COURT INVALIDATED A STATUTE WHICH BARRED ADULTS' ACCESS TO MATERIALS DETERMINED TO HAVE A POTENTIALLY DELETERIOUS INFLUENCE ON CHILDREN, BECAUSE IT "WOULD HAVE HAD THE EFFECT OF "REDUCING THE ADULT POPULATION . . . TO READING ONLY WHAT IS FIT FOR CHILDREN."

LET ME TURN TO THE RESTRICTIONS ON BROADCAST, CABLE TELEVISION AND RADIO CONTAINED IN S. 1090. AS CURRENTLY DRAFTED, THIS LEGISLATIVE PROPOSAL WOULD ALSO EXPAND THE PROHIBITION AGAINST "OBSCENE, INDECENT OR PROFANE" MATERIAL FOUND IN 18 U.S.C. § 1464 TO COVER CABLE TELEVISION. AS FIRST AMENDMENT JURISPRUDENCE STANDS NOW, THE RESTRICTIONS ON OBSCENE MATERIAL CONTAINED THEREIN WOULD PROBABLY WITHSTAND JUDICIAL SCRUTINY. THE SUPREME COURT HAS CONSISTENTLY HELD THAT OBSCENE SPEECH IS NOT ENTITLED TO FIRST AMENDMENT PROTECTION OUTSIDE THE PRIVACY OF ONE'S HOME. SEE STANLEY V. GEORGIA, 394 U.S. 557 (1969); BUT SEE UNITED STATES V. 12,100-FT. REELS OF FILM, 413 U.S. 123, 126-127 (1973); UNITED STATES V. ORITO, 413 U.S. 139 (1973). THE

RESTRICTIONS ON INDECENT OR PROFANE MATERIAL CONTAINED IN THIS SECTION ARE ANOTHER MATTER.

IN FCC V. PACIFICA FOUNDATION, 438 U.S. 726 (1978), THE SUPREME COURT UPHELD RESTRICTIONS ON INDECENT MATERIAL BROADCAST OVER TELEVISION OR RADIO. HOWEVER, THE COURT EMPHASIZED THAT PACIFICA WAS "A VERY NARROW DECISION," WHICH ONLY DEALT WITH INDECENT MATERIAL BROADCAST OVER THE RADIO WHEN CHILDREN WERE LIKELY TO BE LISTENING; IT DID NOT DEAL WITH A TOTAL BAN ON INDECENT MATERIAL EVEN DURING PERIODS WHEN THE AUDIENCE WOULD NOT LIKELY BE COMPRISED OF CHILDREN. A BLANKET PROHIBITION AGAINST BROADCAST OF INDECENT MATERIAL MIGHT NOT BE CONSIDERED A "REASONABLE TIME, PLACE AND MANNER" RESTRICTION SINCE ADULTS, AS WELL AS MINORS, WOULD BE DENIED ACCESS. SEE COX V. NEW HAMPSHIRE, 312 U.S. 569 (1949). MOREOVER, AS WE DISCUSSED ABOVE WITH REGARD TO RESTRICTIONS ON TRANSMISSIONS BY TELEPHONE, THE COMPLETE PROHIBITION AGAINST THE BROADCAST OF INDECENT SPEECH CONTAINED IN SECTION 2 OF S. 1090 MAY ALSO HAVE THE EFFECT OF REDUCING THE ADULT POPULATION TO THAT WHICH IS APPROPRIATE FOR CHILDREN, IN VIOLATION OF BUTLER V. MICHIGAN, SUPRA.

EVEN IF THE PROHIBITION ON INDECENT SPEECH ON BROADCAST TELEVISION IS VALID, A SIMILAR PROVISION APPLICABLE TO CABLE TELEVISION IS NOT A FORTIORI VALID. IN CONSIDERING REGULATORY MEASURES THAT MAY INFRINGE UPON SPEECH, THE NATURE OF EACH MEDIUM MUST BE CONSIDERED SEPARATELY, FOR, AS STATED IN PACIFICA, "EACH MEDIUM OF EXPRESSION PRESENTS SPECIAL FIRST AMENDMENT PROBLEMS." LAST MARCH THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT STRUCK DOWN A MIAMI CITY ORDINANCE REGULATING THE TRANSMISSION OF INDECENT MATERIAL VIA CABLE TELEVISION AS IMPERMISSABLE UNDER THE FIRST AMENDMENT IN CRUZ V. FERRE, 755 F. 2D 1415 (11TH CIR. 1985). THE COURT DECLINED TO EXTEND THE PACIFICA RATIONAL TO CABLE, FINDING THAT CABLE IS NOT A PARTICULARLY PERVASIVE MEDIUM, SINCE SUBSCRIBERS MUST NOT ONLY AFFIRMATIVELY ELECT TO OBTAIN CABLE SERVICE, BUT MUST, IN ADDITION, ELECT TO SUBSCRIBE TO SUPPLEMENTAL PROGRAMMING SERVICES

SUCH AS HBO. CABLE WAS NOT FOUND TO BE UNIQUELY AVAILABLE TO CHILDREN BECAUSE PARENTS ARE ABLE TO EASILY IDENTIFY OBJECTIONABLE PROGRAMS IN ADVANCE THROUGH PROGRAM GUIDES AND COULD USE LOCKBOXES TO PREVENT THEIR CHILDREN FROM VIEWING THESE PROGRAMS. THUS, UNDER THE CRUZ RATIONALE, IT DOES NOT APPEAR THAT S. 1090'S PROHIBITION ON UTTERING INDECENT SPEECH WOULD WITHSTAND CONSTITUTIONAL CHALLENGE.

WE ALSO HAVE SERIOUS DOUBTS CONCERNING S. 1090'S PROHIBITION AGAINST THE UTTERANCE OF PROFANE SPEECH. WHILE AN EARLY DECISION OF THE SUPREME COURT IN CANTWELL V. CONNECTICUT, 310 U.S. 296 309-310 (1940), INDICATED THAT GOVERNMENT MAY RESTRICT PROFANE SPEECH, MORE MODERN DECISIONS RAISE SUBSTANTIAL DOUBTS AS TO WHETHER PROFANE SPEECH WOULD STILL BE FOUND TO BE OUTSIDE THE SCOPE OF THE FIRST AMENDMENT PROTECTION. ALTHOUGH IT IS NOT DEFINED IN S. 1090, THE TERM "PROFANE" HAS BEEN DEFINED ELSEWHERE TO MEAN SACRILEGIOUS. WHILE THE BROADCAST OF SACRILEGIOUS OR IRREVERENT MATERIAL WAS PUNISHABLE UNDER THE RADIO ACT, SEE DUNCAN V. U.S., 48 F.2D 128 (1930), THE SUPREME COURT HAS SINCE HELD THAT, "[U]NDER THE FIRST AND FOURTEENTH AMENDMENTS A STATE MAY NOT BAN A FILM ON THE BASIS OF A CENSOR'S CONCLUSION THAT IT IS SACRILEGIOUS." (SEE BURSTYN, INC. V. WILSON, 343 U.S. 495 (1952)). AS TO THE TERMS "LEWD", "LASCIVIOUS" AND "FILTHY", SINCE THEY PRESUMABLY CONNOTE CONDUCT LESS OFFENSIVE THAN "INDECENT", THEY ARE LESS LIKELY TO WITHSTAND CONSTITUTIONAL MUSTER.

IN VIEW OF THE FOREGOING, IT MAY BE ADVISABLE TO REVISE S. 1090 AS FOLLOWS: 1) RETAIN THE OBSCENITY PROHIBITIONS; 2) LIMIT THE INDECENCY PROHIBITIONS TO BROADCASTING ONLY; AND 3) DELETE USE OF THE WORDS "PROFANE, LEWD, LASCIVIOUS, AND FILTHY" FROM THIS SECTION. IF THIS IS NOT ACCEPTABLE, WE BELIEVE IT WOULD BE HELPFUL TO MAKE IT CLEAR THAT EVEN IF ONE OR MORE OF THE WORDS FOLLOWING "OBSCENE" ARE PROTECTED SPEECH, THE TERMS ARE SEVERABLE. THIS REVISION MAY ENSURE THAT THE ENTIRE STATUTE IS NOT STRUCK DOWN AS CONSTITUTIONALLY INFIRM.

NO MATTER HOW THE FOREGOING QUESTIONS ARE ULTIMATELY RESOLVED, WE WOULD STRONGLY RECOMMEND CLARIFICATION OF S. 1090 GENERALLY ALONG THE FOLLOWING LINES. FIRST, THIS LEGISLATION SHOULD SPECIFY WHETHER THE STANDARD TO BE APPLIED WHEN MAKING DETERMINATIONS OF OBSCENITY OR INDECENCY IS THAT OF THE COMMUNITY WHERE THE ALLEGEDLY OBSCENE OR INDECENT STATEMENT IS UTTERED OR THAT OF THE COMMUNITY WHERE IT IS HEARD. THIS PROBLEM ARISES BOTH WITH RESPECT TO THE PROVISIONS OF S. 1090 APPLICABLE TO TELEPHONE AS WELL AS BROADCAST AND CABLE TRANSMISSIONS. FOR EXAMPLE, IF A PERSON IN UTAH CALLS A NEW YORK "DIAL-A-PORN" SERVICE, SHOULD THE UTAH OR NEW YORK STANDARD GOVERN? SIMILARLY, IF PROGRAMMING IS TRANSMITTED TO NUMEROUS CABLE HEADENDS THROUGHOUT THE COUNTRY, SHOULD THE STANDARD OF THE COMMUNITY FROM WHICH IT IS TRANSMITTED OR THE STANDARD OF THE COMMUNITY WHERE IT IS RECEIVED APPLY? WHILE IT IS POSSIBLE TO OPERATE USING INDIVIDUAL COMMUNITY STANDARDS, AS IS THE SITUATION UNDER THE LIBEL LAWS, THIS WOULD CREATE SOME PROBLEMS FOR INTERSTATE SERVICE PROVIDERS KNOWING IN ADVANCE TO WHAT STANDARDS THEY WOULD BE HELD.

SECOND, WE BELIEVE THAT THE DEPARTMENT OF JUSTICE SHOULD BE ENTRUSTED WITH THE ENTIRE ADMINISTRATION OF S. 1090. SINCE THE ATTORNEY GENERAL REPRESENTS THE GOVERNMENT IN ALL FEDERAL COURT PROCEEDINGS, THE UNITED STATES ATTORNEYS FOR THE VARIOUS DISTRICTS ARE MORE FAMILIAR WITH THE LOCAL STANDARDS AND HAVE ATTORNEYS AVAILABLE TO INITIATE SUCH LITIGATION. USE OF THE PROCESSES AVAILABLE TO THE JUSTICE DEPARTMENT WOULD BE FAR MORE EFFICIENT AND COST-EFFECTIVE THAN THE REQUIREMENT IN SECTION 3 THAT THIS COMMISSION INSTITUTE ACTION AGAINST THOSE WHO VIOLATE S. 1090.

WE AT THE FCC WILL BE PLEASED TO PROVIDE ANY ADDITIONAL ASSISTANCE YOU MIGHT REQUIRE WITH RESPECT TO THIS LEGISLATIVE PROPOSAL. WHILE THE COMMISSION HAS NOT TAKEN A POSITION WITH REGARD TO THE PUBLIC POLICY MERITS OF S. 1090, IT SEEMS APPARENT TO US THAT THIS LEGISLATION, WITH THE CHANGES DESCRIBED ABOVE,

SHOULD HELP TO DETER THE USE OF INTERSTATE TELECOMMUNICATIONS FACILITIES FOR THE TRANSMISSION OF OBSCENE OR INDECENT MATERIALS.

AS A CLOSING COMMENT, WE SUGGEST THAT IT MAY BE USEFUL FOR THE COMMITTEE TO CONSIDER S. 1090 IN TANDEM WITH A RELATED PROPOSAL -- S. 1305, THE "COMPUTER PORNOGRAPHY AND CHILD EXPLOITATION AND PREVENTION ACT OF 1985." WE THINK THERE ARE CERTAIN ADVANTAGES TO BE GAINED BY ADDRESSING ALL ILLEGAL USES OF COMMUNICATIONS FACILITIES TOGETHER. SINCE THE CURRENT PATCHWORK OF STATUTES WHICH GOVERN THE USE OF COMMUNICATIONS FACILITIES FOR THE TRANSMISSION OF OBSCENE OR INDECENT MATERIALS ARE SOMEWHAT INCONSISTENT AND ANTIQUATED, JOINT CONSIDERATION OF THESE MEASURES MAY HELP ENSURE A COMPREHENSIVE SOLUTION TO THIS PROBLEM.

THANK YOU FOR THE OPPORTUNITY TO PRESENT THE VIEWS OF THE FCC ON THIS MATTER. I WILL BE HAPPY TO ANSWER ANY QUESTIONS THE SUBCOMMITTEE MAY HAVE CONCERNING MY TESTIMONY.

FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

SEP 27 1985

IN REPLY REFER TO:

Honorable Jeremiah Denton
United States Senate
Committee on the Judiciary
Washington, D.C. 20510

Attention: Richard Holcomb

Dear Chairman Denton:

At the conclusion of my testimony before the Subcommittee on Criminal Law on July 31, 1985, concerning S. 1090, the "Cable Porn and Dial-a-Porn Control Act," you asked me to respond in writing to several additional questions from members of the Subcommittee. I will restate these questions in their entirety below and follow with my answers, seriatim.

In addition, I would like to take this opportunity to clarify my answer to a question you asked me at the hearing on behalf of Senator Helms. This question, to be discussed in detail below, concerned my opinion as to whether the Commission would support legislation to remove jurisdiction of Federal courts over the use of telecommunications facilities for the transmission of pornographic materials.

1. **"In the Commission's July 19 letter to Senator Thurmond, you stated that the words 'indecent' and 'profane' appearing in Section 1464 may not apply to radio, television, and Cable Television unless they are 'fighting words.' Does this mean that the young man in the case of Cohen v. California could wear his jacket with the four-letter epithet for the draft on television, or that radio and television personalities can use that type of language?"**

Unlike obscenity which is not accorded First Amendment protection, indecent speech is, to a certain extent, entitled to protection under the First Amendment. 1/ It appears that indecent speech may be regulated when it is broadcast on the radio at a time when children are likely to constitute a large portion of the audience. See FCC v. Pacifica Foundation, 438 U.S. 726 (1978), wherein the court based its holding on the pervasive nature of radio and its easy accessibility to

1/ Cohen v. California, 403 U.S. 15, 26 (1971).

children. I see no reason why the Pacifica rationale should not be extended to television, so that indecent speech could be banned during those hours when children would likely comprise a substantial portion of the audience. Thus, what may be considered a permissible exercise of First Amendment rights in the context of a Los Angeles courtroom in Cohen, may not necessarily be considered appropriate for radio and television broadcasts.

While the Supreme Court in Cohen reasoned that the State could not prohibit the public display of a four-letter expletive referring to the draft, I believe that the use of similar words on the broadcast media may be subjected to reasonable time, place and manner limitations. With respect to cable television service, subscription television service, multipoint distribution service or other consensual services, I have grave doubts as to whether language of the type used by the young man in Cohen may be regulated.

Two recent federal decisions from Florida and Utah dealt with the constitutionality of a city ordinance and a state statute prohibiting indecency. While neither case dealt with a federal statute, I believe that the reasoning set forth in these decisions would apply to federal legislation designed to prohibit indecency on cable television or telephone service.

In Cruz v. Ferre, 755 F.2d 1415 (11th Cir. 1985), the court found a Miami city ordinance unconstitutional insofar as it regulated the transmission of indecent material via cable television. In Community Television of Utah v. Wilkerson, Nos. 83-0551A and 83-0581A (D. Utah April 10, 1985), the court struck down Utah's "Cable Decency Act" which provided for "nuisance actions against anyone who continuously and knowingly distributes indecent material within the state over any cable television system or pay-for-viewing television programming." 2/ Both courts concluded that the Pacifica standard was not applicable to cable television, 3/ for as the Wilkerson court noted, "[c]able TV is not an intruder but an invitee whose invitation can be carefully circumscribed." 4/ That court also asserted that the holding in Pacifica was limited by the subsequent case of Bolger v. Youngs Drug Products Corp., 463 U.S. 60 (1983), as follows:

> In Bolger the Court struck down a federal statute which prohibited the mailing of unsolicited advertisements for contraceptives. Justice Marshall, who

2/ Slip op. at 2.

3/ Id. at 28-29.

4/ Id. at 39.

> dissented in Pacifica . . . noted that '[o]ur decisions have recognized that the special interest of the federal government in regulation of the broadcast media does not readily translate into a justification for regulation of other means of communiction.' According to the Court in Bolger, the ruling in Pacifica was justified because broadcasting was uniquely pervasive and 'accessible to children, even those too young to read.' But the Court felt that the 'receipt of mail [was] far less intrusive and uncontrollable' than the broadcast in Pacifica. The Court refused to extend Pacifica to a medium other than broadcast. A reasonable inference may be drawn that the Court desired to limit Pacifica to its facts (citations omitted). 5/

The distinctions between cable television and broadcast television, which were found by the Cruz and Wilkerson courts to be of constitutional significance, were that the homeowner had to subscribe to cable and additionally to the so-called premium channels to which erotic material is generally limited, and that lock boxes are available to prevent children from viewing undesirable channels.

Thus, it seems probable that because of the distinctions between cable and broadcast television, the courts would hold that language such as that found to be protected in Cohen could be banned on broadcast media during hours when children are likely to be in the audience, but probably could not be banned over consensual media, such as cable television.

2. "Didn't the Supreme Court in the Pacifica case refer in the footnotes to the inappropriateness of nudity on television, as well as upholding the 'indecent' standard for radio? Why shouldn't these proscriptions apply to Cable TV as well?"

It is not clear that 18 U.S.C. § 1464 applies to cable television. However, an argument can be made that inasmuch as transmissions to cable headends are by means of radio communications, a cablecaster could be found liable for an obscene broadcast under the theory that he procured its transmission. If § 1464 is found to apply to cable television, I have serious doubts as to the constitutional validity or its prohibitions on non-obscene speech (see discussion to Question 3, infra).

5/ Id. at 31-32.

In FCC v. Pacifica Foundation, 438 U.S. 726, 741 at note 16 (1978), the Supreme Court makes reference to an interpretation of § 1464 first enunciated by the Commission in a Memorandum as amicus curiae in Grove Press, Inc. v. Christenberry, 276 F.2d 433 (2d Cir. 1960). In differentiating between broadcasting [radio and television] and other "media of communication"[books], the Commission elaborated as follows:

> '[W]hile a nudist magazine may be within the protection of the First Amendment ... the televising of nudes might well raise a serious question of programming contrary to 18 U.S.C. § 1464 ... Similarly, regardless of whether the '4-letter words' and sexual description, set forth in 'Lady Chatterly's Lover,' (when considered in the context of the whole book) make the book obscene for mailability purposes, the utterance of such words or the depiction of such sexual activity on radio or TV would raise similar public interest and section 1464 questions' [citations omitted]. 6/

The distinctions between the various media which the Commission found decisionally significant in Grove Press were sanctioned by the Pacifica court, which noted that each medium of expression presents special First Amendment problems. 7/ In upholding the FCC's decision that indecent speech on the radio could be regulated during certain periods, the Court emphasized the narrowness of its holding by focusing on the following factors: 1) "the broadcast media have established a uniquely pervasive presence in the lives of all Americans," and that "[p]atently offensive, indecent material presented over the airwaves confronts the citizen, not only in public, but also in the privacy of the home, where the individual's right to be left alone plainly outweighs the First Amendment rights of an intruder"; and 2) "broadcasting is uniquely accessible to children, even those too young to read." 8/ Since cable television is only available to those who choose to subscribe to it, and lock boxes can be utilized to limit children's access thereto, a cogent argument can be made that the language at issue in Pacifica cannot be banned from cable television.

6/ See FCC v. Pacifia Foundation, supra, 438 U.S. at 740 as quoting Enbanc Programming Inquiry, 44 FCC 2303, 2307-2308 (1960) as quoting Memorandum of the Federal Communications Commission as Amicus Curiae in Grove Press, Inc. v. Christenberry, 276 F.2d 433 (2d Cir. 1960) at 6.

7/ Specifically, the Court in Pacifica noted that there may be constitutionally significant "differences between radio, television, and perhaps closed circuit transmissions." 438 U.S. at 750.

8/ 438 U.S. at 748-49.

3. **"In the Commission's July 19 letter to Senator Thurmond, you refer to the 11th Circuit case of Cruz v. Ferre, in which the U.S. Court of Appeals struck down a Miami City ordinance regulating the transmission of indecent material via Cable TV. Didn't the reported cable cases from Florida and Utah decide the limits of Congress' power to prohibit indecency on cable television or telephone?"**

I agree that the Cruz decision sets limits on Congress' authority to prevent the transmission of indecent material via cable television. While it is hazardous to predict whether the Supreme Court would follow the Cruz rationale or would extend the Pacifica rationale to cable, I think it more likely than not that the Court will distinguish cable from broadcast media and hold that indecent speech may not be regulated on cable television.

4. **"Haven't the courts interpreted section 1464 to include television as well as radio, and pictures as well as language?"**

Courts generally have construed the term "radio communication" to encompass broadcast television based on the fact that Section 3(b) of the Communications Act, 47 U.S.C. § 153(b), includes the transmission of "pictures" in its definition of that term. 9/ Although courts have not yet specifically applied 18 U.S.C. § 1464 to "radio communications," the Commission has espoused this view in an interpretive ruling following this same rationale. 10/

Even though § 1464 specifically prohibits the "utterance" of obscene "language," it is not clear that this provision applies to obscene pictures unaccompanied by language. Thus, it is possible that the courts might not construe a picture to constitute language for purposes of § 1464.

5. **"The first defense the FCC promulgated under Section 223(b) for dial-pornographers was struck down by the Federal Court of Appeals. When you**

9/ See e.g., Midwest Video Corp. v. FCC, 571 F. 2d 1025, 1036 (8th Cir. 1978), aff'd, 440 U.S. 689 (1979); Allen B. Dumont Laboratories v. Carroll, 184 F. 2d 153, 155 (3d Cir. 1950), cert. denied, 340 U.S. 920 (1951).

10/ Memoranda of the Federal Communications Commission as amicus curiae in Grove Press, Inc., v. Christenberry, 276 F. 2d 433 (2d Cir. 1960) at 6, wherein the Commission stated that "[s]ince Section 3(b) of the Communications Act . . . defines 'radio communication' to include the transmission of pictures, the above penalties apply equally to broadcasting."

> reconsider, are you more likely to move beyond 'time of day' regulations and toward more restrictive measures to protect children such as access codes, credit cards, subscription requirements like cable TV operates; or will you recommend less restrictive measures?"

On November 2, 1984, the United States Court of Appeals for the Second Circuit set aside the regulation adopted by the Commission pursuant to 47 U.S.C. § 223(b)(1983). 11/ The Second Circuit remanded the case to this Commission to develop "a record that shows convincingly, that the regulations were chosen after thorough, careful, and comprehensive investigation and analysis." 12/ Accordingly, the Commission adopted a Second Notice of Proposed Rulemaking, (hereinafter "Second Notice") 50 Fed. Reg. 10510 (1985).

Because the Commission is currently evaluating the comments received in response to this Second Notice, I am, of course, unable to discuss specific details of the proceeding at this time. I will say, however, that the Commission has received extensive comments discussing a wide array of regulatory options, including those you consider to be more protective of children, namely, access/identification codes and credit cards. As set forth in our Second Notice, we will, in addition to those options suggested above, carefully consider limiting operational hours, message scrambling (accessible only by those with decoding devices), screening, a variety of blocking schemes, as well as any other proposals suggested by those filing comments in this proceeding. Only after the Commission has thoroughly analysed each of these options, can it determine which method or methods will most effectively prevent children's access to "dial-a-porn" services without, at the same time, reducing the adult population to hearing only what is fit for children in violation of Butler v. Michigan, 352 U.S. 380 (1957). 13/

11/ Carlin Communications, Inc. v. FCC, 749 F.2d 113 (2d Cir. 1984).

12/ Id. at 123.

13/ We are mindful of the fact that any regulation we adopt must also pass constitutional muster. As Congressman Kastenmeier, a co-sponsor of the legislation enacting Section 223(b), expressed in his remarks following passage of this measure:

> [W]e have carefully constructed section 223, as amended, to avoid reducing the adult population to hearing only what is fit for a child. We leave it to the FCC to prescribe the specific

(continued)

6. **"Under the present language of section 223(b) will dial-a-porn services continue to operate? Would it be accurate to say that bottom line is that dial-a-porn services will not stop unless Congress prohibits all obscene or indecent commercial messages, without provisions for a defense for 'consenting adults?'"**

In addition to setting aside the regulation the Commission adopted pursuant to 47 U.S.C. § 223(b) (1983), the United States Court of Appeals for the Second Circuit in Carlin Communications Inc. v. FCC, 749 F.2d 113, 123 (2d Cir. 1984), made a point of emphasizing that "[w]hile the Government has not stated that it will not enforce the statute [47 U.S.C. § 223(b)] after the time-channeling regulation has been set aside, we presume that the Justice Department will continue its earlier policy of not enforcing section 223(b) without a regulation governing dial-a-porn." Thus, the Government is currently foreclosed from implementing § 223(b).

With respect to the ultimate effectiveness of amended § 223(b), however, while I agree with the thrust of your question that a complete ban on "dial-a-porn" servicers would provide a more effective deterrent than allowing them statutory immunity from prosecution upon compliance with an FCC regulation restricting minors' access to these services, I have doubts as to whether a total ban would pass constitutional muster under Butler v. Mighigan, 352 U.S. 380 (1957).

7. **"It took many years before television sets were available and affordable to every American home, and cable TV is quickly becoming available across the country. Would you say that cable and subscription television are becoming as pervasive a form of mass communications as broadcast TV and radio?"**

The increasing importance of subscription services, especially cable television, is well documented. According to statistics, in 1985 more than 85 million U.S. homes (98% of all homes) have television sets. There are also an estimated 355 million radio

---

(13/ continued)

> regulations that permit adult access while limiting children's access. If, however, no such regulations are feasible, then less restrictive measures rather than broader restrictions will have to suffice to avoid any constitutional infirmity.

129 Cong. Rec. E-5966-67 (daily ed. Dec. 14, 1983).

sets in American homes. 14/ According to Neilson estimates, cable households in the United States now number 38,673,270, placing national cable penetration at 45.3% of all television households. 15/ A recent study has found that the number of cable subscribers will continue to increase to 48 million in 1990. 16/ As of April 1, 1984, 58% of the cable systems exceed 12 channels.

Hence, while it would seem that cable television is well on its way to becoming as pervasive as broadcast television and radio, I do not believe the same can be said of subscription television or "STV", another pay service which transmits scrambled signals "over-the-air" to its subscribers. Since its establishment as a permanent service in 1968, STV grew rapidly from approximately 400,000 subscribers in 1980 to about 1.5 million in 1982. During that same time period, the number of STV channels grew from eight in eight markets to 31 in 22 markets. 17/ However, increased cable penetration has apparently led to a decline in the number of STV outlets in recent years. In 1985, there were approximately 500,000 STV subscribers and 27 STV channels operating in 20 markets. 18/

As I mentioned in my testimony before the Subcommittee, I do not believe that the pervasiveness of cable television, simpliciter, can be used as a basis for regulating cable in the same manner as broadcasting. I am of the opinion that the courts will continue to find the distinctions between cable and broadcast television to be of constitutional significance; namely, that one has to elect to subscribe to cable service as well as the adult programming and that subscribers may employ lock boxes to prevent access to objectionable programming.

This concludes my answers to the written questions that you presented to me at the close of my testimony before the Subcommittee. I will now turn to the question from Senator Helms:

> **Would the Federal Communications Commission support legislation designed to remove the jurisdiction of the Federal courts over the transmission of pornographic materials via media of mass communications and the telephone.**

14/ Broadcasting/Cablecasting Yearbook 1985, at A-2.

15/ Broadcasting Magazine, June 17, 1985, at 10.

16/ Television and Cable Factbook, 1984 Edition, No. 52 at 1726.

17/ Broadcasting/Cablecasting Yearbook 1984, at A-6.

18/ Broadcasting/Cablecasting Yearbook 1985, at A-7 and C-82.

While the full Commission has not had an opportunity to consider the policy implications of such legislation, I see no reason why it would register opposition thereto on legal grounds. The proposal seems to be constitutionally valid, at least to the extent it would divest the lower federal courts of jurisdiction over prosecutions for criminal activities related to pornography. The bounds of the Congressional power to regulate the appellate jurisdiction of the Supreme Court, however, is less clear.

The Supreme Court has consistently held that Congress may, pursuant to Article III, § 1 of the Constitution, 19/ limit the jurisdiction of the lower Federal courts. In Lockerty v. Phillips, 319 U.S. 182, 187-88 (1943), which involved a suit by wholesale meat dealers to restrain the Government from prosecuting violations of certain price regulations, the Court stated that:

> "[t]here is nothing in the Constitution which requires Congress to confer equity jurisdiction on any particular inferior federal court . . . [T]he Congressional power to ordain and establish inferior courts includes the power of investing them with jurisdiction either limited, concurrent, or exclusive, and of withholding jurisdiction from them in the exact degrees and character which to Congress may seem proper for the public good."

Similarly, in Lauf v. E.G. Shinner & Co., 303 U.S. 323, 330 (1938), which arose under the Norris-La Guardia Act and limited the power of the Federal courts to issue restraining orders in labor disputes, the Court stated that "there can be no question of the power of Congress thus to define and limit the jurisdiction of the inferior courts of the United States." See also Sheldon v. Sill, 49 U.S. (8 How.) 441, 449 (1850), where the Supreme Court upheld § 11 of the Judiciary Act of 1789, which prevented Federal courts from taking cognizance of any suit to recover the contents of any promissory note or other chose in action under specified circumstances as a valid exercise of Congress' Art. III, § 1 power to "withhold from any court of

19/ Section 1 of Article III provides that the "judicial power of the United States shall be vested in one supreme court and in such inferior courts as the Congress may from time to time ordain and establish."

its creation jurisdiction of any of the enumerated controversies." 20/ In view of these decisions, I see no reason why Congress may not validly withdraw the jurisdiction of the lower federal courts over pornography prosecutions.

The question as to whether Congress may deprive the Supreme Court of jurisdiction over pornography prosecutions appears to be unsettled. Article III, § 2 provides that the appellate jurisdiction of the Supreme Court shall cover the cases enumerated therein "with such Exceptions, and under such Regulations as the Congress shall make. The Court has never delineated the reach of the exceptions clause, but in Ex Parte McCardle, 74 U.S. (7 Wall.) 506 (1869), the Court did sustain a withdrawal of its appellate jurisdiction. In McCardle, a prisoner in the custody of the military authorities took to the Supreme Court an appeal of a denial by a Circuit Court of a petition for a writ of habeas corpus. Jurisdiction over the appeal was based on a provision of the Act of February 5, 1867, 14 Stat. 385. Although the Supreme Court heard oral argument in the case, Congress subsequently passed the Act of March 27, 1868, 15 Stat. 44, which withdrew jurisdiction of the Supreme Court over appeals taken under the Act of February 5, 1867. The Court held that such a withdrawal was permissible as an exercise of the Congressional power to make exceptions to the Supreme Court's appellate jurisdiction.

It is noteworthy that the Act of March 27, 1868 did not remove all powers of the Supreme Court to review denials of writs of habeas corpus; review of such denials pursuant to Section 14 of the Judiciary Act of 1789, 1 Stat. 81, was unaffected. See Ex Parte Yerger, 75 U.S. (8 Wall.) 85 (1868). Therefore, the question of whether Congress can withdraw all of the appellate jurisdiction of the Supreme Court over certain subjects is unsettled. Although it may have been tempted, Congress has not

20/ In Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304, 331 (1816), Justice Story seemed to express a contrary view that "Congress are bound to create some inferior courts, in which to vest all that jurisdiction which, under the constitution, is exclusively vested in the United States, and of which the supreme court cannot take original cognizance." However, it seems clear that Justice Story was aware that Congress had not conferred the entire constitutional grant of appellate jurisdiction on the lower federal courts, since, contemporaneously with the Martin decision, he urged Congress to widen the jurisdiction of the Federal courts to encompass the whole of that grant. See Gunther & Dowling, Cases & Materials on Constitutional Law 57-58 (8th ed. 1970); See also Hart & Wechsler, The Federal Courts and the Federal System, 313-315 (2d ed. 1973). In any event, the views expressed by Justice Story in Martin as to the requirement that Congress invest the lower courts with the entire appellate jurisdiction have not been followed by subsequent Supreme Court decisions.

tested the limits of its constitutional authority in this area since the Civil War, probably in recognition of the importance of the Supreme Court's role to resolve the conflicts which would inevitably arise between state court decisions. I would respectfully suggest that before you consider a proposal to limit the Supreme Court's appellate jurisdiction, however, you seek the views of the Department of Justice as to whether the rationale of Ex Parte McCardle would support withdrawal of all Supreme Court appellate jurisdiction over pornography cases.

I trust the foregoing is responsive to the questions from the members of the Subcommittee concerning S. 1090. Please do not hesitate to contact me if I can provide you with any further assistance with respect to this legislative initiative.

Sincerely yours,

Jack D. Smith
General Counsel

Senator DENTON. Mr. Anderson was to be our next witness. He is involved in an out-of-State business matter. He regrets that he cannot be here today.

The next witness is Mr. James J. Clancy, a private attorney from Los Angeles, CA. Mr. Clancy is a recognized expert in the area of the first amendment and obscenity law.

He is an experienced prosecutor, representing the side of the Government in obscenity prosecutions in a number of cases. I happen to know he has been an amicus curiae in innumerable cases on this subject before the Supreme Court.

He is a former assistant city attorney for the city of Burbank, CA, and is a former head of a special obscenity prosecutions unit under the Los Angeles, CA, district attorney's office.

I want to welcome you today, Mr. Clancy. Your complete written statement will be placed in the record, and I would ask that you take 15 minutes to summarize your testimony. And I want to thank you for making available certain exhibits for the subcommittee for review concerning the content of cable TV.

All right. Would you proceed with your testimony, sir?

STATEMENT OF JAMES J. CLANCY, ATTORNEY, LOS ANGELES, CA

Mr. CLANCY. Thank you very much, Senator, for affording me the opportunity to speak on behalf of the bill, and also to give an account of the historical background on how it is that hardcore pornography, which is unlawful under Federal law, now is appearing on cable television.

On the bill itself, I would like to make two suggestions or amendments. First, I believe that the provision which gives specific standing to the Attorney General or the Commission to bring a civil action to enjoin any act or practice which violates the dial-a-porn provisions should also be included to give the specific authority to him in the case of 1464(a).

Further, they should add a provision which authorizes the Federal Government, if it prevails in the civil action, to recover all expenses in such injunctive action on a restitutionary basis. That is to provide an opportunity for the Federal Government, in light of all the taxes and the like, to make it available for them to go against the industry which needs to be proceeded against.

In my opinion, the Attorney General and the Commission already possess this standing which is necessary to bring an injunctive action and a declaratory judgment action to stop the exhibition of hardcore pornography.

However, by specifically including it in the bill, it would make it easier for the general public to convince the personnel in those departments that they have got a duty, and that their failure to act is a dereliction of their duties.

Seventeen years ago, I appeared before the Senate Judiciary Committee in connection with the nomination of Associate Justice Abe Fortas to be Chief Justice. At a hearing before a subcommittee, before three Senators—McClellan, Fong, and Hart—I was given the opportunity to show them some of the material that Abe Fortas had acted upon.

Immediately after showing the 8-millimeter film 0-7, Senator McClellan turned to me and in absolute indignation said: "Do you mean to tell me, Mr. Clancy, that Associate Justice White voted to reverse that conviction?" I said yes.

The way Senator McClellan addressed the question suggested my facts were in error in my response, I pointed to the decision which showed in the record that he did. After that presentation, Senator McClellan changed his mind on Justice Fortas and voted against his nomination.

I am certain today that were Senator McClellan in the Senate, he would be equally as shocked, and would demand that a Senate inquiry be made into why the Department of Justice and why the Federal Communications Commission have failed to act to stop the transmission of the hardcore films that are regularly being transmitted on pay TV, such as ON TV, and on cable television, such as the Playboy channel. In my judgment, that failure is a clear dereliction of their duties.

Four years ago, I did a survey on what was appearing on television and found that ON TV, owned and operated by Oak Industries of San Diego, was transmitting hardcore pornography as a regular course of its business in Phoenix, Los Angeles, and in other parts of the United States.

In February and April 1981—that is 4 years ago—I commenced a surveillance of the motion picture films which were regularly exhibited on channel 52 in Glendale and on channel 15 in Phoenix.

In that surveillance, each of the ON TV transmissions were monitored and recorded on videocassette. That channel 52 surveillance has continued to the present day. The one on channel 15 was terminated in June 1983 when the owners of channel 15 stopped broadcasting on ON TV and sold the station to Scripps-Howard for a reported $10,500,000. Now, it is about this surveillance of ON TV that I want to address the committee.

On September 1, 1983, when the license of channel 15 in Phoenix came up for renewal, I filed a petition for denial of the license with the FCC because of what channel 15 was transmitting.

I gave as an example the film "The Opening Of Misty Beethoven." "The Opening Of Misty Beethoven" which had been shown on channel 15 had been held to be hardcore pornography in a reported decision by the Alabama Supreme Court in *Trans-Lux Theater* v. *People Ex Rel. Sweeton,* 366 SO. 2nd 710.

I advised the FCC as to the names of the other titles which were regularly surveilled and told them that in my judgment, ON TV was regularly showing hardcore pornography on channel 15.

In early 1983, the partners in the ON-TV transmission on channel 15—ON-TV owners and channel 15 owners—fell into disagreement which ended up in a lawsuit in the State court, in which the subject of what they were broadcasting was one of the issues—one of the parties—channel 15 owners—said it was indecent, in violation of Federal law.

At that time, I brought the matter to the attention of the U.S. attorney in Phoenix, showed him "Sex Wish" and told him I had made more than 200 recordings of other similar transmissions on channel 15. He said: "Mr. Clancy, you do not have to show me 200

recordings; I have seen 'Sex Wish' and I agree with you completely."

He called the opposing party and said he was going to intervene on the grounds that ON-TV broadcasting was in violation of Federal law. The parties the next day told the U.S. attorney in Phoenix that they had stipulated that the issue of indecency was going to be taken out of the State lawsuit, and therefore removed his jurisdiction to act in the matter.

Subsequently—this was 11 months later after my protest—I was advised by James C. McKinney, Chief of the Mass Media Bureau of the FCC, that because I was a resident of southern California and was only currently in the process of purchasing a residence in Phoenix, AZ, and had not alleged that I was a viewer of KNXT-TV, or resided within the service area, I did not have "standing" to file a petition. They denied my petition and renewed the license of channel 15.

At that time, channel 15 was in the process of stopping the transmission of these films on ON TV, and had offered to sell it to Scripps-Howard for $10,500,000. The FCC covered up, in effect, for channel 15 and refused my protest on the grounds of "standing" because of the fact that I had made the protest, and at the time I was living in Los Angeles.

Then on November 1, 1983, when the license of channel 52 in Glendale came up for renewal, I filed a similar petition against its renewal with the FCC. I informed the FCC that hardcore pornography was being broadcast by channel 52.

In that petition, I filed videotapes of five of the surveillance recordings for the films "The Opening Of Misty Beethoven," "Sex Wish," "Easy," "Talk Dirty To Me," and "Vista Valley PTA," as an exhibit, and I also included time and motion studies of the five films.

As of this date, some 20 months later, the petition for denial has not yet been acted upon at the FCC. I am informed that Oak Industries, Inc., which is the producer of ON TV and owns channel 52, has since sold its interest in ON TV subscription list to Select TV and is presently negotiating for the sale of channel 52.

Oak Industries, which is the producer of ON TV and owns channel 52 has since sold its subscription list interest to Select TV and is presently negotiating for the sale of channel 52 to a purchaser who will operate that station as a Spanish-speaking television station.

As a result of the FCC's inaction on the matter, a fraud is about to be perpetrated upon the general public of the State of California and the United States, similar to that which occurred with channel 15 in Phoenix.

FCC's inaction will permit Oak Industries, Inc., the prime movers who are responsible for the introduction of hard-core pornography on television, to escape responsibility for their criminal actions and to make a healthy profit, to boot, in the sale of channel 52.

At the same time, Select TV will take over where ON TV has left off. As a part of this fraud, the ON TV broadcasts are presently in the process of being shifted from channel 52 to channel 22—a maneuver which, when completed, will pave the way for channel

52 to argue to the FCC that the renewal of its license and sale to the owners of the new Spanish-speaking station should be approved because the obscenity issue has been rendered moot; that is, it has been taken off of 52—and put on 22.

During the 20-month period during which the FCC has sat upon the petition to deny the renewal of the license of channel 52, its owner, Oak Industries, has steadily increased the grossness of its hardcore pornography transmissions.

What I am saying is that when I made the protest 20 months ago, the "hardcore" was only "hardcore." Now, it is so grossly hardcore, it is perverse. Oak Industries, Inc., not only has not changed its position, but the product has become much worse.

Because the subject matter that Oak Industries telecasts on ON TV is derived from the hardcore version produced by the manufacturers of such films, the nature of their responsibility for such broadcasts can be established by reference to the cuts which Oak Industries, Inc., regularly makes from the original videocassette tape versions, to arrive at the version which is to be transmitted over channel 52.

I have lodged with this committee time and motion studies of the following films which have been exhibited on channel 52, with graphics, to explain; one, the nature of the cuts which they have made before transmission on ON TV; and, two, the increase in grossness of the product that they have been transmitting in the 20 months that the petition to deny the renewal of the license of channel 52 has been pending.

I have listed the films I am talking about. The exhibits are in the exhibit room and the graphics show what it is they have cut from the hardcore version—sold in the porno bookstore and shown in porno theaters—before they show it on TV.

Because the FCC has been derelict in its duties and has failed to stop the ON TV transmission of hardcore on pay TV, a scandal has been perpetrated on the general public which infers that such subject matter is free speech and entitled to constitutional protection.

As a result, other telecasters like Playboy channel on cable have followed suit and are now telecasting the same type of hardcore pornographic materials that appeared on ON TV 2 years ago.

Playboy has come around and said, well, nobody is stopping ON TV—which is pay TV—so why should we not do it? And that is exactly what they have been doing. They have been repeating the same subject matter and they now have got it on cable TV.

Senator DENTON. Let me see if I understand you correctly, Mr. Clancy. Are you saying that the FCC was derelict in its duty, in that they permitted the broadcast, as opposed to cable transmission, of obscene material which in violation of existing law, and that they failed to effectively address this issue?

Is that correct as point one?

Mr. CLANCY. That is exactly what I am saying. ON TV is pay TV. It is a signal which is sent through the air, coded, and it is received by the persons who subscribe to the activity.

Senator DENTON. Second, is it correct to say that this influenced the cable TV people, such as Playboy, who felt perfectly secure in transmitting obscene materials on cable TV, when they observed that obscene materials were permitted to be broadcast on TV?

Mr. CLANCY. That is exactly what has occurred. Not only the Playboy channel, but Select TV and all the other telecasters, have picked up where ON TV started. I am saying that because ON TV is the one who started it, the FCC is now in a situation where they can do something about it on channel 52 because Oak Industries, Inc., owns channel 52 and they want to sell it to another party.

The FCC is about to use this means of not acting upon it and letting them get out from under to permit them to sell it or get rid of it without responsibility for what they have done in the past 5 years.

When that began to occur, I authorized a continuous surveillance of the films being telecast on the Playboy channel. I found them to be the same brand of hardcore pornography that was originally transmitted by ON TV in 1981 and 1982.

I prepared time and motion studies of 18 Playboy channel transmissions, randomly selected, which are in the exhibit room. Among these are "The Opening Of Misty Beethoven," which was held by the Alabama Supreme Court—that is the State from which you come—to be hardcore pornography.

I was the one who argued the case before the Alabama Supreme Court. They knew exactly what they were sending. There is a hardcore version and a so-called softcore version. The softcore version, which was the one before the Alabama Supreme Court, is the one that was broadcast on ON TV and Playboy.

Another, that was recently broadcast by Playboy TV was "I Am Curious Yellow." Now, that has never played on ON TV or any other station before, but about 2 weeks ago the version that was before the Georgia Supreme Court in the *Evans Theater Corporation* case played on Playboy.

"I Am Curious Yellow" was the subject of an injunction in *Evans Theater Corporation* v. *Slaton,* a Georgia Supreme Court case—cert denied in *Evans Theater* v. *Slaton* in the United States Supreme Court.

The Georgia Supreme Court said you cannot exhibit sex acts in the theater, and they enjoined the showing of "I Am Curious Yellow," which was absolutely mild. That went up to the United States Supreme Court which refused to hear the case.

The *Evans Theater* case has been cited as a procedure which is acceptable: It was cited with approval by the U.S. Supreme Court as a correct procedure in *Paris Adult Theater* v. *Slation.* So we have here a situation in which one of the specific films which was denied cert in the United States Supreme Court has recently played on the Playboy channel.

The appearance of such hardcore pornography on pay TV and cable TV, such as Playboy, is spreading a false rumor in the communities throughout the United States that such materials are "protected" subject matter.

People turn on their cable and ON TV transmissions in Podunk and "reason" that since it is playing on TV, it must be legitimate. So people in the videocassette sales stores in the community are applying the same "look" and are now selling the same thing—the hardcore version.

They get the idea that since it is acceptable on pay television and since it is playing on cable, it must be acceptable. Nobody is prosecuting.

Senator DENTON. Mr. Clancy, so that we can separate the obscene from the profane and indecent, is it not true that the Cable Act makes it a felony to transmit obscene material on cable television.

Mr. CLANCY. That is correct; now, it is a felony.

Senator, as a result of this, you have what is actually a national scandal, and that is everybody believes it is permissible and is accepted by the Constitution because the FCC permits it to come about.

In 1979, which is 6 years ago, in a letter to the Attorney General, Griffin Bell, I made the statement that if the Federal Government did not act, it was going to cause a national scandal.

In that letter I said as follows:

> If the Federal Government fails to offer the all-out Federal resistance which is necessary to cope with this new videotape threat, then the porno trade is certain to attain their ultimate objective during the Carter administration.
>
> In the short period of 15 years, they will have gained total access to the American home. During that period of time they will, in successive steps, have taken the hard-core film out from under the counter and use in private exhibitions, and extended it to public exhibitions in the sleazy porno theaters on Main Street and in art theaters in remote parts of good neighborhoods, then to public audiences in neighborhood store-converted and other regular theater houses (abandoned because of TV use and other economic changes), and finally into the family home itself through TV use and the videotape format.
>
> The Carter administration, which will bear the final responsibility for the ultimate failure of Federal law enforcement to cope with the problem, will be laying itself open for charges which, when examined under a microscope, will disclose a national scandal.

I was referring there to the fact that the industry knew and broadcast the fact that the Federal Government had taken itself out of the prosecution of such matters and was not going to do anything about it.

Five months after my letter to U.S. Attorney General Bell in 1979, I addressed the same type of communication to the California attorney general, George Deukmejian, now Governor of California. Neither of those public officials took any action to stem the tide.

In both of the above letters to former Attorney General Bell and to then California Attorney-General Deukmejian, I suggested that one of the solutions to the problem is the one that was proposed by James Jackson Kilpatrick in his recent article in June 1985 entitled "How Do You Curb Pornography."

In this regard, I bring to the committee's attention two articles on the same subject which appeared in the Los Angeles Times of May 20, 1985, entitled "Sex Filmmaker Convicted Under 1982 Pandering Law," and "Hard-Core Sex Films—Does Casting Constitute Pandering?"

In those cases it is "prostitution" to engage in the making of such films and "conspiracy" to band together to decide to make such films. Just recently, there was a conviction in Los Angeles, under the California law, which is regarded as one of the weakest obscenity statutes. They got him for making a film entitled "Caught from Behind No. 2". They said it was prostitution to engage in the act for hire.

A number of years ago the male actor in "Deep Throat" had been prosecuted by the Federal Government for conspiracy. He was convicted. It was reversed on a technicality. The Attorney General of the United States then refused to prosecute him again. This is one area in which the Federal Government can and should proceed.

In conclusion, and to move this problem in the direction outlined above, I would like to suggest that the 18 time and motion studies that I have done of the Playboy channel programs and the 15 time and motion studies of the Oak ON TV programs which I have lodged with this committee be brought to the personal attention of U.S. Attorney General Edwin Meese, with a copy of my statement on this matter, and request that he look into the substance of my statement to determine whether or not there is something that the Federal authorities can do to stop this traffic on cable and pay TV.

Five years ago, ON TV began transmitting hard core pornography on pay TV. They said at that time "We can do it because the people who are paying for it are willing viewers, and therefore you cannot do anything about it."

Senator, this was the very issue which was litigated in the *Paris Adult Theater* case. In that case, the defendants stated that because the viewers of the films in the porno theater had paid, they were willing and you could not make it a crime.

The Supreme Court of Georgia said that was not so; that the Senate interest was otherwise. The case went up to the United States Supreme Court and the United States Supreme Court said notwithstanding that the viewers had paid and were willing victims, it still could be made a crime by the sovereign State, and also inferentially by the Federal Government.

Senator DENTON. You requested that we forward the exhibits to the Attorney General's Commission or to the Attorney General himself.

We will not only present him with the exhibits; we will transfer to him a complete transcript of this hearing today, and one to his commission on pornography.

Mr. CLANCY. Thank you very much, Senator.

In closing, I would like to make a statement. The result is a veritable inundation of television with hard core pornography. In my judgment, which is based on 23 years of experience of watching the spread of obscenity from Main Street dives to the typical American home, if this is not stopped immediately through corrective action by the Department of Justice and the FCC, this Nation will be destroyed by moral corrosion from within.

As Abraham Lincoln aptly put it, "All the armies of Europe, Asia, and Africa combined . . . could not by force take a drink from the Ohio . . . in a trial of a thousand years." And "at what point then is the approach of danger to be expected? If it ever reach us, it must spring up amongst us. It cannot come from abroad. If destruction be our lot, we must ourselves be its author and finisher."

During the past 5 years, I have repeatedly warned that because of this erosion on TV, this Nation faces a moral Dunkirk. I suggest that the hour is late.

Thank you very much.

Senator DENTON. Thank you, sir.

We appreciate your testimony today very much.
Mr. CLANCY. Thank you very much, Senator.
[The prepared statement of Mr. Clancy follows:]

Prepared Statement of James J. Clancy

SENATOR DENTON, I WANT TO THANK YOU AND SENATOR HELMS AND SENATOR EAST PERSONALLY FOR HAVING INTRODUCED SENATE BILL 1090, AND FOR PERMITTING ME TO SPEAK ON BEHALF OF THE BILL AND GIVING A STATEMENT ON THE HISTORICAL BACKGROUND OF HOW IT HAS COME ABOUT THAT "HARD-CORE PORNOGRAPHY", WHICH IS UNLAWFUL UNDER FEDERAL LAW, IS NOW REGULARLY BEING EXHIBITED ON CABLE T.V.

ON THE BILL ITSELF, I WOULD LIKE TO RECOMMEND TWO AMENDMENTS: FIRST, THE PROVISION AT PAGE 3, LINE 23 THROUGH PAGE 4, LINE 10, WHICH GIVES SPECIFIC STANDING TO THE ATTORNEY GENERAL OR THE COMMISSION TO BRING A CIVIL ACTION TO ENJOIN ANY ACT OR PRACTICE WHICH VIOLATES THE DIAL-A-PORN PROVISIONS, SHOULD BE EXTENDED TO AUTHORIZE AN INJUNCTIVE ACTION FOR AN ALLEGED VIOLATION OF § 1464(a); SECONDLY, THE BILL SHOULD ALSO INCLUDE A PROVISION WHICH AUTHORIZES THE FEDERAL GOVERNMENT, IF IT PREVAILS IN THE CIVIL ACTION, TO RECOVER ALL EXPENSES IN SUCH INJUNCTIVE ACTION ON A RESTITUTIONARY BASIS.

IN MY OPINION, BOTH THE ATTORNEY GENERAL AND THE COMMISSION ALREADY POSSESS THE "STANDING" WHICH IS NECESSARY TO BRING AN INJUNCTIVE LAWSUIT TO STOP THE EXHIBITION OF HARD-CORE PORNOGRAPHY ON CABLE T.V. HOWEVER, BY INCLUDING A SPECIFIC PROVISION TO THAT EFFECT IN SENATE BILL 1090, IT WILL BE A MUCH EASIER TASK FOR THE GENERAL PUBLIC TO CONVINCE THE PERSONNEL IN THOSE DEPARTMENTS THAT THEY HAVE A DUTY TO ACT AND THAT THEIR FAILURE TO ACT IS A DERELICTION OF THEIR DUTIES.

SEVENTEEN YEARS AGO, AT 1:10 P.M. ON FRIDAY, JULY 19, 1968, THE COMMITTEE ON THE JUDICIARY CLOSED THE HEARING ON THE NOMINATION OF ABE FORTAS TO BE CHIEF JUSTICE AND OPENED THE HEARING ON THE NOMINATION OF HOMER THORNBERRY TO BE ASSOCIATE JUSTICE WITHOUT HAVING AFFORDED ME AN OPPORTUNITY TO PRESENT MY SCHEDULED TESTIMONY. IN RESPONSE TO A COMPLAINT FROM THE SENATOR FROM IOWA, A SPECIAL SUBCOMMITTEE MET ON THE FOLLOWING DAY,

CONSISTING OF SENATOR JOHN MCCLELLAN OF ARKANSAS, SENATOR PHILIP A. HART OF MICHIGAN AND SENATOR HIRAM L. FONG OF HAWAII, TO VIEW COPIES OF CERTAIN EXHIBITS WHICH ACCOMPANIED MY TESTIMONY. AT THAT HEARING, AFTER HAVING VIEWED THE 8MM FILM 0-7 WHICH HAD BEEN BEFORE THE U.S SUPREME COURT IN SHACKMAN V. CALIFORNIA, SENATOR MCCLELLAN'S FIRST REMARK AS SPOKESMAN FOR THE SUBCOMMITTEE WAS TO ASK ME IN INDIGNANT DISBELIEF, "DO YOU MEAN TO TELL ME THAT ASSOCIATE JUSTICE WHITE VOTED TO REVERSE THE CONVICTION INVOLVING 0-7?" I ASSURED HIM THAT THAT HAD OCCURRED AND POINTED TO THE APPELLATE RECORD WHICH ESTABLISHED THAT FACT.

ON MONDAY, JULY 22, 1968, THE HEARING ON FORTAS' NOMINATION WAS REOPENED AND THE COPIES OF THE SUBJECT MATTER INVOLVED IN 26 OBSCENITY CASES WHICH HAD BEEN BEFORE THE U.S. SUPREME COURT DURING THE 1966 AND 1967 TERMS WAS LAID BEFORE THE FULL COMMITTEE AND LATER THE ENTIRE SENATE. SUBSEQUENTLY, SENATOR MCCLELLAN CHANGED HIS VIEW ON THE FORTAS NOMINATION AND THEREAFTER, JUSTICE FORTAS' NOMINATION WAS DEFEATED, PARTIALLY AS A RESULT OF HIS VOTING RECORD ON THE OBSCENITY CASES.

I AM CERTAIN THAT WERE SENATOR MCCLELLAN ALIVE TODAY, HE WOULD BE EQUALLY AS SHOCKED AND WOULD DEMAND THAT A SENATE INQUIRY BE MADE INTO WHY THE DEPARTMENT OF JUSTICE AND F.C.C. HAVE FAILED TO ACT (INCLUDING THE USE OF THE CIVIL PROCESS AND INJUNCTION) TO STOP THE TRANSMISSION OF HARD-CORE PORNOGRAPHY THAT IS BEING TRANSMITTED DAILY ON PAY TELEVISION, SUCH AS "ON-T.V." AND CABLE TELEVISION, SUCH AS THE "PLAYBOY CHANNEL". IN MY JUDGMENT, THAT FAILURE IS A CLEAR DERELICTION OF THEIR DUTIES.

FOUR YEARS AGO I DID A SURVEY OF WHAT WAS APPEARING ON TELEVISION AND FOUND THAT "ON-T.V.", OWNED AND OPERATED BY OAK INDUSTRIES, INC., OF SAN DIEGO, WAS TRANSMITTING "HARD-CORE PORNOGRAPHY" AS A REGULAR COURSE OF ITS PAY T.V. BUSINESS, BOTH IN PHOENIX, ARIZONA AND LOS ANGELES, CALIFORNIA.

IN FEBRUARY AND APRIL OF 1981, I COMMENCED A SURVEILLANCE OF THE MOTION PICTURE FILMS BEING EXHIBITED BY OAK INDUSTRIES ON CHANNEL 52 (KBSC-TV) IN GLENDALE, CALIFORNIA AND ON CHANNEL 15

(KNXV-TV) IN PHOENIX, ARIZONA. IN THAT SURVEILLANCE, EACH OF THE "ON-T.V." TRANSMISSIONS OF ADULT FILMS WERE MONITORED AND RECORDED ON VIDEOTAPE CASSETTE. THE CHANNEL 52 SURVEILLANCES HAVE CONTINUED TO THIS DATE, WHILE THE CHANNEL 15 SURVEILLANCES WERE TERMINATED IN JUNE OF 1983 WHEN CHANNEL 15 CEASED BROADCASTING THE "ON-T.V." PROGRAMMING AND WAS SOLD TO SCRIPPS-HOWARD FOR A REPORTED $10,500,000.00.

ON SEPTEMBER 1, 1983, WHEN THE LICENSE OF STATION KNXV-TV, CHANNEL 15 IN PHOENIX CAME UP FOR RENEWAL (RENEWAL DATE, OCTOBER 1, 1983), I FILED A "PETITION FOR DENIAL OF RENEWAL OF LICENSE OF STATION KNXV-TV CHANNEL 15, PHOENIX, ARIZONA" WITH THE FEDERAL COMMUNICATIONS COMMISSION. A COPY OF THAT PETITION IS ATTACHED AS EXHIBIT 1 TO THIS STATEMENT. IN THAT PETITION, I INFORMED THE F.C.C. THAT HARD-CORE PORNOGRAPHY WAS BEING TRANSMITTED ON CHANNEL 15 AS A REGULAR COURSE OF BUSINESS. I GAVE AS AN EXAMPLE, THE FILM "THE OPENING OF MISTY BEETHOVEN", EXHIBITED ON "ON-T.V." ON OCTOBER 27, 1981, WHICH THE ALABAMA SUPREME COURT HAD BEFORE IT IN TRANS-LUX THEATER V. PEOPLE EX REL. SWEETON, 366 SO.2d 710 (JAN. 19, 1979) AND HAD HELD TO BE "HARD-CORE PORNOGRAPHY" UNDER ALABAMA LAW. IN EXHIBIT 1 TO THAT PETITION I ADVISED THE F.C.C. AS TO THE NAME OF THE TITLES WHICH HAD BEEN SURVEILLED AND RECORDED AT MY DIRECTION DURING THE PERIOD OF APRIL 1981 THROUGH APRIL 1983.

IN EARLY 1983 THE PARTNERS WHO CONTROLLED CHANNEL 15 FELL INTO DISAGREEMENT, WHICH ENDED UP AS A LAWSUIT IN THE MARICOPA COUNTY SUPERIOR COURT. IN APRIL 1983, I BROUGHT THE SUBJECT MATTER WHICH WAS BEING TELECAST ON CHANNEL 15 TO THE ATTENTION OF U.S. ATTORNEY A. MELVIN MCDONALD, IN PHOENIX, WITH COPIES OF "SEX WISH" AND OTHER CHANNEL 15 TELECASTS. UPON EXAMINING THE SUBJECT MATTER, U.S. ATTORNEY MCDONALD STATED HE WOULD INTERVENE IN THE STATE LAWSUIT ON THE GROUNDS THAT THE SUBJECT MATTER WAS UNLAWFUL UNDER FEDERAL LAW. WHEN HE INFORMED CHANNEL 15'S ATTORNEYS OF HIS INTENTIONS, THEY TOLD HIM THAT THE FEDERAL ISSUE OF INDECENCY HAD BEEN REMOVED FROM THE STATE LAWSUIT BY STIPULATION OF THE PARTIES.

A COPY OF MY APRIL 14, 1983 LETTER TO U.S. ATTORNEY MCDONALD IS ENCLOSED AS EXHIBIT 2.

BY LETTER DATED AUGUST 17, 1984, A COPY OF WHICH IS ATTACHED AS EXHIBIT 3 TO THIS PETITION, I WAS ADVISED BY JAMES C. MCKINNEY, CHIEF OF THE MASS MEDIA BUREAU OF THE F.C.C., THAT BECAUSE I WAS A RESIDENT OF SOUTHERN CALIFORNIA AND WAS ONLY "CURRENTLY IN THE PROCESS OF PURCHASING A RESIDENCE IN PHOENIX, ARIZONA, AND HAD NOT ALLEGED THAT "I WAS A VIEWER OF KNXV-TV OR RESIDED WITHIN ITS SERVICE AREAS", I DID NOT HAVE "STANDING" TO FILE THE PETITION TO DENY AND THAT MY PLEADING WOULD BE DISMISSED PURSUANT TO SECTION 73,3584(C) OF THE F.C.C. RULES, WITHOUT THE F.C.C. TAKING ANY CORRECTIVE ACTION AGAINST THE OPERATORS OF CHANNEL 15. THE OWNERS OF CHANNEL 15 WERE PERMITTED TO SELL CHANNEL 15 TO SCRIPPS-HOWARD FOR A REPORTED $10,5000,000.00.

ON NOVEMBER 1, 1983, WHEN THE LICENSE OF STATION KBSC-TV, CHANNEL 52 IN GLENDALE CAME UP FOR RENEWAL (RENEWAL DATE, DECEMBER 1, 1983), I FILED A PETITION FOR DENIAL OF RENEWAL OF LICENSE OF STATION KBSC-TV (CHANNEL 52, GLENDALE, CALIFORNIA) WITH THE FEDERAL COMMUNICATIONS COMMISSION, CONTAINING SIMILAR ALLEGATIONS AS TO THOSE MADE IN THE PETITION AGAINST CHANNEL 15. A COPY OF THAT PETITION IS ATTACHED AS EXHIBIT 4 TO THIS STATEMENT. IN THAT PETITION, I INFORMED THE F.C.C. THAT HARD-CORE PORNOGRAPHY WAS BEING TRANSMITTED ON CHANNEL 52 AS A REGULAR COURSE OF BUSINESS AND INCLUDED AS EXHIBIT 1 TO THAT PETITION A COPY OF THE TITLES OF THE FILMS SURVEILLED DURING THE PERIOD OF FEBRUARY 14, 1981 THROUGH SEPTEMBER 10, 1983. AS EXHIBIT 2 TO THAT PETITION I ENCLOSED VIDEOTAPE COPIES OF FIVE OF THE SURVEILLANCE RECORDINGS FOR THE FOLLOWING FILMS: (1) "THE OPENING OF MISTY BEETHOVEN", (2) "SEX WISH", (3) "EASY", (4) "TALK DIRTY TO ME" AND (5) "VISTA VALLEY P.T.A." AS EXHIBIT 3 TO THAT PETITION, I ENCLOSED A TIME AND MOTION STUDY OF THE FIVE FILMS NAMED IN EXHIBIT 2. COPIES OF THOSE TIME AND MOTION STUDIES ARE BEING LODGED WITH THIS SUB-COMMITTEE AS A PART OF MY STATEMENT.

AS OF THIS DATE, SOME 20 MONTHS LATER, THE PETITION FOR

DENIAL OF RENEWAL OF LICENSE OF STATION KBSC-TV (CHANNEL 52, GLENDALE, CALIFORNIA) HAS NOT YET BEEN ACTED UPON BY THE F.C.C. I AM INFORMED THAT OAK INDUSTRIES, INC., WHICH IS THE PRODUCER OF "ON-TV" AND OWNER OF CHANNEL 52, HAS SINCE SOLD ITS INTEREST IN "ON-TV" TO "SELECT TV" AND IS PRESENTLY NEGOTIATING FOR THE SALE OF CHANNEL 52 TO A PURCHASER WHO WILL OPERATE THAT STATION AS A SPANISH-SPEAKING TELEVISION STATION. AS A RESULT OF THE FAILURE OF THE F.C.C. TO ACT ON THE MATTER, A FRAUD IS ABOUT TO BE PERPETRATED UPON THE GENERAL PUBLIC IN THE STATE OF CALIFORNIA AND THE UNITED STATES, SIMILAR TO THAT IN WHICH THE F.C.C. PERMITTED THE RENEWAL OF THE LICENSE OF CHANNEL 15 WITHOUT SANCTIONS. THE F.C.C. INACTION WILL PERMIT THE PRIME MOVERS RESPONSIBLE FOR THE INTRODUCTION OF "HARD-CORE PORNOGRAPHY" TO TELEVISION TO ESCAPE RESPONSIBILITY FOR THEIR CRIMINAL ACTIONS AND TO MAKE A HEALTHY PROFIT TO BOOT, IN THE SALE OF CHANNEL 52. AT THE SAME TIME, "SELECT T.V." WILL TAKE UP WHERE "ON-TV" HAS LEFT OFF.

AS A PART OF THIS FRAUD, THE "ON-TV" BROADCASTS ARE PRESENTLY IN THE PROCESS OF BEING SHIFTED FROM CHANNEL 52 TO CHANNEL 22, A MANEUVER WHICH WHEN ACCOMPLISHED, WILL PAVE THE WAY FOR CHANNEL 52 TO ARGUE TO THE F.C.C. THAT THE RENEWAL OF ITS LICENSE AND SALE TO THE OWNERS OF THE "NEW" SPANISH SPEAKING STATION SHOULD BE APPROVED BECAUSE THE "OBSCENITY" ISSUE HAS BEEN RENDERED MOOT!

DURING THE 20 MONTH PERIOD DURING WHICH THE F.C.C. HAS "SAT" UPON THE PETITION TO DENY THE RENEWAL OF THE LICENSE OF CHANNEL 52 (Nov. 1, 1983-JULY, 1985), ITS OWNER, OAK INDUSTRIES, HAS STEADILY INCREASED THE GROSSNESS OF ITS HARD-CORE PORNOGRAPHY TRANSMISSIONS. BECAUSE THE SUBJECT MATTER THAT OAK INDUSTRIES TELECASTS ON "ON-TV" IS DERIVED FROM THE HARD-CORE VERSION PRODUCED BY THE MANUFACTURES OF SUCH FILMS, THE NATURE OF THEIR RESPONSIBILITY FOR SUCH BROADCASTS CAN BE ESTABLISHED BY REFERENCE TO THE CUTS WHICH OAK INDUSTRIES, INC. REGULARLY MAKES FROM THE ORIGINAL VIDEOCASSETTE TAPE VERSION TO ARRIVE AT THE VERSION WHICH IS TO BE TRANSMITTED OVER CHANNEL 52 (NOW CHANNEL 22 ALSO). I HAVE LODGED WITH THIS COMMITTEE TIME AND MOTION STUDIES OF THE

FOLLOWING FILMS WHICH HAVE BEEN EXHIBITED ON CHANNEL 52 WITH GRAPHICS TO EXPLAIN: (a) THE NATURE OF THE "CUTS" WHICH OAK INDUSTRIES HAS MADE BEFORE TRANSMISSION OF THE "ON-TV" VERSION, AND (b) THE INCREASE IN GROSSNESS OF THE PRODUCT THEY HAVE BEEN TELEVISING:

3A "THE OPENING OF MISTY BEETHOVEN" 7/11/81
B "SEX WISH" 10/11/82
C "EASY" 9/3/82
D "TALK DIRTY TO ME" 9/11/82
E "VISTA VALLEY P.T.A." 9/5/82
F "INSATIABLE" 6/3/83

5A "TABOO" 12/11/83
B "SATISFACTIONS" 1/8/84
C "INSATIABLE" 4/25/84
D "DEVIL IN MISS JONES, PART I and II" 8/29/84
E "INSATIABLE II" 4/25/84

6A "TABOO" (ORIGINAL VIDEOCASSETTE VERSION)
B "SATISFACTIONS" (ORIGINAL VIDEOCASSETTE VERSION)
C "INSATIABLE" (ORIGINAL VIDEOCASSETTE VERSION)
D "THE DEVIL IN MISS JONES" (ORIGINAL VIDEOCASSETTE VERSION) AND "THE DEVIL IN MISS JONES- PART II" (ORIGINAL VIDEOCASSETTE VERSION)

BECAUSE THE F.C.C. HAS BEEN DERELECT IN ITS DUTIES AND HAS FAILED TO STOP THE "ON-TV" TRANSMISSIONS OF HARD-CORE PORNOGRAPHY ON PAY T.V., A "SCANDAL" HAS BEEN PERPETRATED ON THE GENERAL PUBLIC WHICH INFERS THAT SUCH SUBJECT MATTER IS "FREE SPEECH" AND ENTITLED TO CONSTITUTIONAL PROTECTION. AS A RESULT, OTHER TELECASTERS LIKE THE "PLAYBOY CHANNEL" HAVE FOLLOWED SUIT AND ARE NOW TELECASTING THE SAME TYPE OF HARD-CORE PORNOGRAPHIC MATERIALS THAT APPEARED ON "ON-TV" TWO YEARS AGO.

WHEN THAT BEGAN TO OCCUR, I AUTHORIZED A CONTINUOUS SURVEILLANCE OF THE FILMS BEING TELECAST ON THE "PLAYBOY CHANNEL". I FOUND THEM TO BE THE SAME BRAND OF HARD-CORE PORNOGRAPHY THAT WAS ORIGINALLY TRANSMITTED BY "ON-TV" IN 1981 AND 1982. I HAVE PREPARED TIME AND MOTION STUDIES OF 18 "PLAYBOY CHANNEL" TRANSMISSIONS randomly selected which ARE BEING LODGED WITH THE COMMITTEE FOR STUDY IN CONNECTION WITH THIS STATEMENT. ONE OF THE "PLAYBOY" TRANSMISSIONS IS "THE OPENING OF MISTY BEETHOVEN", ANOTHER IS "I AM CURIOUS, YELLOW", WHICH WAS THE SUBJECT OF AN INJUNCTION IN EVANS THEATER CORP. V. SLATON, @@& Ga. 377, 180 S.E.2d 712 (1971), CERT. DENIED IN EVANS THEATER V. SLATON, 404

U.S. 950 (NOV. 9, 1971) AND CITED WITH APPROVAL AS TO PROCEDURE IN PARIS ADULT THEATER V. SLATON, 413 U.S. 49 AT 54 91973).

THE APPEARANCE OF SUCH HARD-CORE PORNOGRAPHY ON PAY T.V. AND CABLE T.V. IS SPREADING THE FALSE RUMOR IN THE COMMUNITIES THROUGHOUT THE U.S. THAT SUCH MATERIALS ARE PROTECTED SUBJECT MATTER. AS A RESULT, VIDEOCASSETTE TAPES OF THE RANKEST "HARD-CORE" MATERIALS ARE SURFACING IN THE NEIGHBORHOOD VIDEOCASSETTE STORES AND ARE BEING INTRODUCED INTO ALL OF THE COMMUNITIES THROUGHOUT THE U.S. THE RESULT IS A "NATIONAL SCANDAL" WHICH, IN TURN HAS GENERATED AN ENTHUSIASM IN THE GENERAL PUBLIC FOR SENATE BILL 1090 WHICH IS PRESENTLY BEFORE THIS COMMITTEE.

GENTLEMEN! THE "NATIONAL SCANDAL" THAT NOW FACES US IS ONE THAT I PREDICTED WOULD OCCUR IN A LETTER TO ATTORNEY GENERAL GRIFFIN B. BELL, DATED FEBRUARY 16, 1979. A COPY OF THAT CORRESPONDENCE IS ENCLOSED AS EXHIBIT 5 TO THIS STATEMENT. AT PAGE 8, I STATED:

> " IF THE FEDERAL GOVERNMENT FAILS TO OFFER THE ALL-OUT FEDERAL RESISTANCE WHICH IS NECESSARY TO COPE WITH THIS NEW VIDEOTAPE THREAT, THEN THE PORNO TRADE IS CERTAIN TO ATTAIN THEIR ULTIMATE OBJECTIVE DURING THE CARTER ADMINISTRATION. IN A SHORT PERIOD OF 15 YEARS, THEY WILL HAVE GAINED TOTAL ACCESS TO THE AMERICAN HOME. DURING THAT PERIOD OF TIME THEY WILL, IN SUCCESSIVE STEPS, HAVE TAKEN THE HARD-CORE FILM OUT FROM UNDER THE COUNTER AND USE IN PRIVATE EXHIBITIONS, AND EXTENDED IT TO PUBLIC EXHIBITIONS IN THE SLEAZY PORNO THEATERS ON MAIN STREET AND IN ART THEATERS IN REMOTE PARTS OF GOOD NEIGHBORHOODS, THEN TO PUBLIC AUDIENCES IN NEIGHBORHOOD STORE-CONVERTED AND OTHER REGULAR THEATER HOUSES (ABANDONED BECAUSE OF "T.V." USE AND OTHER ECONOMIC CHANGES), AND FINALLY INTO THE FAMILY HOME ITSELF THROUGH "T.V." USE AND THE VIDEOTAPE FORMAT. THE CARTER ADMINISTRATION, WHICH WILL BEAR THE FINAL RESPONSIBILITY FOR THE ULTIMATE FAILURE OF FEDERAL LAW ENFORCEMENT TO COPE WITH THE PROBLEM WILL BE

LAYING ITSELF OPEN FOR CHARGES WHICH, WHEN EXAMINED UNDER A MICROSCOPE, WILL DISCLOSE A NATIONAL SCANDAL.

" IF THE ABOVE COMES TO PASS, AND IT WILL IF THE FEDERAL GOVERNMENT FAILS TO ACT EFFECTIVELY, IT IS MY FURTHER OPINION THAT ONE OF TWO THINGS WILL OCCUR. EITHER THE CITIZENRY WILL TURN AND MOUNT AN ATTACK IN THE PROPORTION OF PROPOSITION 13, AGAINST THE RESPONSIBLE PARTIES, INCLUDING THOSE WHO BY INACTION HAVE PERMITTED IT TO GAIN FREE REIGN OR, ALTERNATIVELY, THE NATION WILL DROWN IN ITS OWN IMMORAL CESSPOOL AND VIGILANTE ACTION WILL BEGIN TO TAKE OVER. THE LATTER POSSIBILITY IS THE MORE FRIGHTENING FOR, AS A BAROMETER, IT WILL CARRY WITH IT THE KNOWLEDGE THAT THIS NATION WILL ALSO BE UNABLE TO OFFER RESISTANCE TO THOSE ENEMIES FROM WITHOUT WHO, IN THE YEAR 1978 SEEM TO BE TESTING US IN OTHER FIELDS OF COMPETITION."

FIVE MONTHS AFTER MY LETTER TO U.S. ATTORNEY GENERAL BELL, I ADDRESSED THE SAME TYPE OF COMMUNICATION TO CALIFORNIA ATTORNEY GENERAL CEORGE DEUKMEJIAN (NOW GOVERNOR OF CALIFORNIA). A COPY OF THAT CORRESPONDENCE IS ENCLOSED AS EXHIBIT 6 TO THIS STATEMENT. NEITHER OF THOSE PUBLIC OFFICIALS TOOK ANY ACTION TO STEM THE TIDE.

IN BOTH OF THE ABOVE LETTERS, I SUGGESTED THAT ONE OF THE SOLUTIONS TO THE PROBLEM IS THE ONE WHICH WAS PROPOSED BY JAMES JACKSON KILPATRICK IN HIS ARTICLE IN JUNE OF 1985, "HOW DO YOU CURB PORNOGRAPHY?" IN THIS REGARD, I BRING TO THE COMMITTEE'S ATTENTION TWO ARTICLES ON THE SAME SUBJECT WHICH APPEARS IN THE LOS ANGELES TIMES OF MAY 20, 1985, ENTITLED "SEX FILM MAKER CONVICTED UNDER 1982 PANDERING LAW" AND "HARD-CORE SEX FILMS--DOES CASTING CONSTITUTE PANDERING?" COPIES OF THE THREE ARTICLES ARE ATTACHED AS EXHIBIT 7 TO THIS STATEMENT.

IN CONCLUSION, AND TO MOVE THIS PROBLEM IN THE DIRECTION OUTLINED ABOVE, I WOULD LIKE TO SUGGEST THAT THE 18 TIME AND MOTION STUDIES OF THE "PLAYBOY CHANNEL" PROGRAMS AND THE 15 TIME AND MOTION STUDIES OF THE OAK "ON-T.V." PROGRAMS WHICH I HAVE

LODGED WITH THIS COMMITTEE BE BROUGHT TO THE PERSONAL ATTENTION OF U.S. ATTORNEY GENERAL EDWIN MEESE WITH A COPY OF MY STATEMENT IN THIS MATTER AND A REQUEST THAT HE LOOK INTO THE SUBSTANCE OF MY STATEMENTS TO DETERMINE WHETHER THERE IS SOMETHING THAT THE FEDERAL AUTHORITIES CAN DO TO STOP THIS TRAFFIC.

FIVE YEARS AGO, "ON-T.V." BEGAN TRANSMITTING "HARD-CORE" PORNOGRAPHY ON PAY T.V. AND HAS CONTINUED TO DO SO TO THE PRESENT TIME. WHEN I SAY "HARD-CORE PORNOGRAPHY" I MEAN OBSCENE MATTER WHICH IS IN VIOLATION OF FEDERAL STATUTES. BECAUSE THE DEPARTMENT OF JUSTICE AND THE F.C.C. HAVE TAKEN NO ACTION ON THAT MATTER, OTHER TELECASTERS FOLLOWED SUIT, INCLUDING THOSE WHICH ARE APPEARING ON CABLE, SUCH AS "THE PLAYBOY CHANNEL". THE RESULT IS A VERITABLE INUNDATION OF TELEVISION WITH HARD-CORE PORNOGRAPHY. IN MY JUDGMENT, WHICH IS BASED UPON 23 YEARS OF EXPERIENCE, WATCHING THE SPREAD OF OBSCENITY FROM MAIN STREET DIVES TO THE TYPICAL AMERICAN HOME, IF THIS IS NOT STOPPED IMMEDIATELY THROUGH CORRECTIVE ACTION BY THE DEPARTMENT OF JUSTICE AND THE F.C.C., THIS NATION <u>WILL</u> BE DESTROYED BY MORAL CORROSION FROM WITHIN, AS ABRAHAM LINCOLN APTLY PUT IT, "ALL THE ARMIES OF EUROPE, ASIA AND AFRICA COMBINED, . . . COULD NOT BY FORCE, TAKE A DRINK FROM THE OHIO, . . . IN A TRIAL OF A THOUSAND YEARS." AND ". . . AT WHAT POINT THEN IS THE APPROACH OF DANGER TO BE EXPECTED? . . . IF IT EVER REACH US, IT MUST SPRING UP AMONGST US. IT CANNOT COME FROM ABROAD. IF DESTRUCTION BE OUR LOT, WE MUST OURSELVES BE ITS AUTHOR AND FINISHER". DURING THE PAST FIVE YEARS, I HAVE REPEATEDLY WARNED THAT THIS NATIONS FACES A MORAL "DUNKIRK", THE TIME IS LATE. . . .

Senator DENTON. I shall read portions of the press release authorized by Dr. Dolf Zillman. The headline he has on his release is "New Data on the Effects of Non-Violent, Non-Coercive, Soft-Core Pornography."

Since he is not here today the only recourse I have is to read his press release which represents a summary of his testimony. I quote:

At a Senate hearing today, new data on the effects of pornography was released. The anti-social impact of sexually violent pornography is frequently touted, but recent evidence indicates that repeated exposure to non-violent, soft-core pornography can produce ill effects as well.

Three studies conducted over the course of the past 5 years by Dr. Jennings Bryant of the University of Houston and Dr. Dolf Zillman of Indiana University indicate that exposure to standard, X-rated pornographic films or videotapes have a number of potentially harmful effects on perceptions and attitudes.

Findings from the first study indicate that repeated exposure to non-violent, non-coercive pornography removed initial repulsion to soft-core material. In addition, it created less repulsion to hard-core, sexually-violent pornography.

Moreover, individuals who repeatedly viewed soft-core pornography tended to have distorted perceptions of sexuality in society. . . . Massively-exposed individuals also exhibited a loss of concern about the potential ill effects of pornography on others, and they saw less of a need to restrict pornography.

Most importantly, women, and especially men who have been massively exposed to pornography, came to look at rape as a reasonably trivial offense.

The second study examined the effects of extended exposure to non-violent pornography on the value of marriage and the family, on general happiness and satisfaction, and on personal satisfaction with one's own sexual situation, behavior, and partner.

The findings show that massively-exposed individuals held marriage and the family in diminished regard, showed more tolerance for pre-marital and extra-marital sex, and projected that they and others would be more promiscuous and less faithful if opportunities for pre-marital or extra-marital sex should arise.

No ill effects on general happiness and satisfaction, nor on professional satisfaction were observed. However, those who were heavy viewers of pornography reported substantial dissatisfaction with their own sexual situation and with their sexual partner.

I must digress at this point. He states that although the individuals in this study who were massively exposed to pornography were not generally unhappy at that time, they did become substantially dissatisfied with their sexual partner.

I have heard testimony from scores of individuals and a number of experts including psychiatrists and sociologists—which indicates a substantial "loss of happiness" which can be traced to family breakups or the infidelities which result from this injected dissatisfaction resulting from the massive exposure to pornography. We have heard many other testimonies aside from, but relevant to, Dr. Zillmann's testimony here. I continue with my quote of his release.

In the final study, following repeated exposure to non-violent pornography, viewers of sexually-oriented segments from prime time television found the material to be less wrong morally than did a control group.

Massively-exposed viewers also found less morally bad a variety of hypothetical situations, ranging from the sexual seduction of a 12-year-old girl to extra-marital affairs.

Digressing once more, I do not have to remind you of child pornography, which is the currency among the pedophiles, or the slogan of the Rene Guyon Society of "Sex before eight, or else it's too late," and other unspeakable practices of pedophiles, including the transmission by computer of the names of children with whom they are sexually involved, and whom they exploit and harm not only psychologically, but in many cases very seriously physically.

Many pedophiles started with "non-violent; noncoercive" pornography as their initial indulgence.

Continuing with the quotation from Dr. Zillmann:

> These findings indicate that massive exposure to pornography can affect common, everyday moral judgments.

And he concludes,

> All in all, evidence from these related studies clearly indicates that repeated exposure to non-violent pornography can have harmful social and psychological effects.

Our next witness is Mr. Bruce Taylor. Mr. Taylor is general counsel and vice president of Citizens for Decency through Law, in Phoenix, AZ.

Mr. Taylor is presently serving as special counsel representing the Maricopa County attorney and the Arizona State attorney general in an Arizona case involving State control of dial-a-porn material.

Mr. Taylor is an experienced prosecutor and a recognized expert in the area of the first amendment and obscenity law. He is a former assistant city prosecutor and assistant director of law for the city of Cleveland.

He has handled numerous obscenity prosecutions at both the trial and appellate level, and has argued before the United States Supreme Court.

I may, Mr. Taylor, be required to interrupt your testimony in deference to Congressman Bliley who is scheduled to arrive shortly. But, Mr. Taylor, I welcome you to today's hearing. Your complete written statement will be placed in the record and I will ask you to summarize your testimony.

STATEMENT OF BRUCE A. TAYLOR, VICE PRESIDENT AND GENERAL COUNSEL, CITIZENS FOR DECENCY THROUGH LAW, INC., PHOENIX, AZ

Mr. TAYLOR. Thank you, Senator. As I indicated in my written statement, one of the cases that our office is presently working on involves the challenge by Carlin Communications in Federal district court in Phoenix of the action of the Mountain Bell Telephone Co. in disconnecting the dial-a-porn service in their seven-State network.

Mountain Bell received a letter from the county attorney of Maricopa informing them that the grand jury had begun investigation into whether or not the calls going out over the phone system in Phoenix by Carlin were harmful to minors, since they had been reaching minors and complaints had been made that parents were getting bills into the hundreds of dollars that the kids had made by these calls.

Mountain Bell took an action in writing letters to different services like Carlin and the others who provide these sexually explicit messages and indicated that they were going to disconnect them the following week, and filed a lawsuit at the same time asking a Federal court for direction in that regard.

They asked the court, are the messages obscene or harmful to minors; can we disconnect or should we not disconnect?

The Federal court held a hearing and Judge Copple reviewed the phone messages, found that they were obscene and harmful to

minors, that they were reaching minors, and ordered Mountain Bell to disconnect the service.

Mountain Bell then dismissed their lawsuit and a corporate policy was adopted by their board that decided to not in the future offer any form of adult-oriented, sexually explicit message services like dial-a-porn.

This brought a lawsuit by Carlin against Mountain Bell, naming the county prosecutor of Maricopa County, Tom Collins. Mr. Collins, the prosecutor, was dismissed out of the lawsuit when he agreed with Carlin that if he dropped the grand jury investigation and they dropped their challenge to the statute and agreed not to reconnect their service, they would go home and he would drop his charges.

They did dismiss the prosecutor, but then they added the attorney general to the lawsuit, and the Governor, and challenged the statute in what the prosecutor believes is a breach of the agreement, but the case did proceed.

I indicated in the statement that there were hearings held last Friday and yesterday in the district court on motions for summary judgment, meaning that the judge was going to decide whether or not the law applied to these dial-a-porn, whether they were preempted under Federal law, or whether they were a prior restraint.

Yesterday afternoon, Judge Hardy, not the judge who ruled that the messages were obscene in the first hearing, but who has the case before him now, issued summary judgment decisions without opinions. He did not say why, but he did say that even though the local statutes and the tariffs filed by the phone company allowing them to disconnect were not preempted by Federal law or FCC policy, he felt that the tariffs were an unconstitutional prior restraint.

He felt that the statute is unconstitutional as applied to dial-a-porn, meaning the Arizona harmful to minors law, and found that the phone company discriminated against Carlin Communications by treating them differently than other scoop line services on the basis of sexual content.

So we have a situation in Phoenix where the phone company was ordered by a Federal judge to disconnect messages that he found to be illegal under both Federal and State law, and meeting the definitions of Miller, which, being obscene, lacked all first amendment protection, and meeting the definition for harmful to minors, which means that they are not to be disseminated to minors.

Yet, another Federal judge finds that that was a prior restraint for the phone company to act in that regard and will, presumably, on Friday of this week issue an order giving an injunction to Carlin that will force the phone company to put their service back on.

This is one instance of the confusion that has resulted from the passage of 223(b) in November 1983. There are only a few cases that have had reported or unreported, but written decisions entered in them dealing with dial-a-porn.

The FCC general counsel who testified here this morning indicated one from California where Judge Toshima issued an order that found that the actions of Pacific Bell in trying to shut off dial-a-porn would amount to a prior restraint.

But there were two other Federal judges, one in Florida and one in Georgia, who held just the opposite and did not find that either the actions of the telephone company were State action or that their desire to cut off dial-a-porn would be a prior restraint.

There was also a State court case in Louisiana, called South Central Bell, involving also Carlin Communications, where the court said that—even though it was in State court, found that it was probably a State action by the phone company to seek to disconnect these services, but that since the court had found certain messages obscene, they were going to allow South Central Bell to disconnect the service if they continued to show those types of obscene messages.

What we ended up with, however, is that in South Central Bell, Carlin still has their dial-a-porn service, but they have a more suggestive type rather than an explicit type, whereas in all the other jurisdictions their messages are not fairly characterized as suggestive, but are clearly explicit.

We have provided to the committee the tapes of two calls recorded by a Phoenix police officer, made to the local 976 number in Phoenix that are supplied to Carlin Communications out of New York, and the transcripts of those calls which were submitted as affidavits in this court case in Phoenix.

The calls that are now going out from New York that are supplied by High Society magazine and the ones supplied by credit card by Hustler magazine and many of the other services and prostitution enterprises that advertise in those such magazines are explicit enough to be obscene under any test, as Judge Copple said.

I have put the language that Judge Copple used in his order in my written statement to show that the court was considering the content of the messages under the full test, as given by the Supreme Court in Miller.

There has been comment that the existence of 223 in the dial-a-porn context and even 1464 in cable-porn or television context has created a chilling effect on speech, or that this has somehow caused dial-a-porn companies and cable TV programmers to self-censor their material. I think that nothing could be further from the truth.

If you look at the kind of material available in 1970 and compare it to what is available today, they are two different worlds. In 1970 we had what you could call nudity and simulated sex, and people would call that soft core pornography. Today, you can hardly find that kind of material.

The kinds of messages that people were prohibited from saying on television and communicating by commercial phone messages even a few years ago would have been stopped by the FCC are now being defended by the FCC and are being litigated in Federal courts.

The State prosecutors are finding it increasingly difficult to stop this kind of traffic, which if the Federal Government allows to cross State lines either in the pornography industry where they truck hundreds and thousands of films and magazines into a local jurisdiction and then it becomes a prosecutor's duty to try to prosecute them on an individual book-by-book or film-by-film basis—as any of the Members of Congress, including Senator Specter, who I

know was a State prosecutor, know, that is a big job trying to prosecute obscenity cases once the Federal Government allows the material to cross State lines and enter our jurisdictions.

Senator DENTON. Mr. Taylor, if you will permit an interruption in your testimony, I must acknowledge the arrival here of Senator Strom Thurmond, the chairman of the Judiciary Committee and the return of Senator Arlen Specter, the Senator from Pennsylvania.

I would, in view of the constraints of senatorial schedules, recognize them at this time. If I may ask the deference of Senator Specter, who has been here twice, can you wait long enough for us to hear from the distinguished chairman of the Judiciary Committee?

Senator SPECTER. I can.

Senator DENTON. Thank you, Senator Specter.

Senator Thurmond.

The CHAIRMAN. Thank you very much, Mr. Chairman. I am in another hearing, but I am so interested in this matter, I thought I would run by and make a very brief statement, if that is appropriate.

Mr. Chairman, obscenity and pornography are not new problems. In the last quarter of a century, we have seen the pornography business grow from a network of underground bookstores which was never mentioned in polite company to a major multi-million-dollar industry, with ties to almost every form of legitimate and illegitimate business.

With increasing frequency, some type of obscene material or smut is thrust into our lives. In fact, the pornography industry of this country has been growing at such an alarming rate that it is impossible for even the most callous to ignore.

One possible cause of the growth of the pornography industry stems from the inherent conflict between our desperate need to control pornography and our equally important need to preserve the right to free speech under the U.S. Constitution.

The constitutionality of current Federal, State, and local antipornography laws, in general, rely upon Supreme Court holdings that obscene materials are not protected by the first amendment.

Unfortunately, this obscenity test has often proven to be vague and unworkable in many cases, and subject to everchanging Court interpretation. The end result, of course, is that laws and justice are thwarted and pornographers go free.

These same pornographers have been able to capitalize on the recent advances in the electronic media that perhaps more than anything else have made the regulation of the various forms of pornography a monumental problem.

In the late 1960's and early 1970's, hard core pornography was available only in the major inner-city pornography shops. Aside from the proliferation of adult bookstores and the creeping of pornographic literature into supermarkets and drug stores, technological innovations have developed so quickly that meaningful regulation cannot keep pace.

Millions of homes currently subscribe to adult programming on regular cable channels. Similarly, 9 million owners of home video recorders can now buy or rent the most graphic pornographic movies on video cassettes.

If we add to this the development and widespread use of so-called dial-a-porn telephone services, it is not hard to see why the Federal Communication Commission and our legislatures have had trouble implementing constitutionally valid controls.

Because of these technical innovations, new issues surrounding the old problem of pornography must be examined. I commend this subcommittee for examining this important issue, and be assured you have my full cooperation.

I want to say that the distinguished chairman of this subcommittee and I attended a meeting downtown several days ago and I was just amazed at the different magazines—they must have had any number of magazines there, all of them showing graphic nudity, obscenity, and pornography.

Now, I do not see how any parent of a child would approve of material such as that being distributed in our society. It is not right; it should be stopped. And I hope that action can be taken to prevent the spread of this propaganda and to stop all this pornographic material from being sold because it is undermining the spirit and the moral uplifting of the people of this country.

Thank you, Mr. Chairman.

Senator DENTON. Thank you, Mr. Chairman, for taking the time from your busy and responsible day to make a statement on this issue. We appreciate your support and leadership on this and other issues.

Senator Specter was here before and, as I mentioned in my opening statement, as the chairman of the Subcommittee on Juvenile Justice of the Senate Committee on the Judiciary, he has chaired extensive hearings on the subject of the effects of pornography.

I would wish to acknowledge that I have learned a great deal attending his subcommittee hearings. I repeat this story over and over, but he had in one of his Juvenile Justice hearings the head of the youth group that opposes street crime.

What was the name of that group?

Senator SPECTER. The Guardian Angels.

Senator DENTON. It was most enlightening to hear the testimony of the young gentleman who is the leader of the Guardian Angels. He was quite articulate in his responses to some basic and nationally important questions posed by Senator Specter, dealing with issues such as juvenile crime, narcotics, illegitimate births, and brutality in the streets.

This young man blamed in part the role models that adults are permitting young people to adopt. Our society is being ripped apart by the magnitude of negative images, and the general negative impressions given to young people through role models that glamorize pornography, narcotics, and other criminal activity.

It was a simple statement by a young man, but I think it bears upon this subject area.

Senator Specter.

Senator SPECTER. Thank you very much, Mr. Chairman. At the outset, I commend you for convening these hearings on this important subject, especially as it relates to juveniles. The Subcommittee on Juvenile Justice, as you have noted, Mr. Chairman, has held hearings on related subjects.

I believe that the problem with cable television is an especially acute one to the extent that children have access to the x-rated and pornographic materials presented there. As Senator Thurmond has outlined, the courts interpreting the Constitution have said that the interests of freedom of speech are paramount, but that is when it relates to adult activity.

Consenting adults may, in our society, act as they please and have access to materials as they please, really, without limit. And in a free society, that is the way it is, but the Supreme Court has established a different standard when it comes to juveniles.

Juveniles may not have access to pornographic materials. There is a double standard, but in this case the double standard is well-founded and for good reason. And I believe that we do have to initiate some remedies on the issue of cable that juveniles should not have access to pornography on cable.

The dial-a-porn is a brand new and proliferating industry. I recently received a telephone call from my wife, councilwoman Joan Specter, who sits on the Philadelphia City Council, who is very active in this field and recently found a book, "How to Have Sex With Kids," on the newsstands in Philadelphia and initiated action which resulted in the prosecution of the publisher.

But one day about a month ago she called me and said they are passing out leaflets in center city Philadelphia to call a number. And I said, well, what is heard when you dial the number? And she said, I do not know; I did not dial the number. And I said, well, why not? And she said, because I did not want to hear it.

And then she started to describe to me what somebody else had said, and I said, tell me the number, and I dialed the number. And I have heard a lot on various subjects, having been DA of Philadelphia for 8 years. I have done a lot of prosecution of pornography.

But in the course of a 1-minute audio, I was aghast. It was the most titillating 1 minute that I have ever heard, and you can only listen to it. It is like Justice Potter Stewart some years ago said in a decision on obscenity—he said I cannot define it, but I can tell it when I see it. Well, you could tell this when you heard it.

And then the end of the recording was, for more, dial—another number was given and it was a 213 area code, which is Los Angeles. I am told, but frankly find it hard to believe, that there is a division with the phone companies on the cost of these toll calls.

But this dial-a-porn is just coming into vogue and, again, as it relates to adults in our free society, adults can do as they choose. But when accessibility is made to children—and these leaflets were being handed out indiscriminately to teenagers and youngsters below the age of 18 where the laws are different—there really has to be a remedy to enforce existing constitutional laws on the dissemination of this kind of obscenity.

So, Mr. Chairman, I again commend you for your initiative in this field. I regret that I cannot stay, but I did want to lend my support to your activities. I am a member of this subcommittee and I was here earlier and could not stay, and I have other commitments now.

But I do think it is an important subject and I will be reviewing the testimony of the witnesses here as we try to fashion a way to respond in a legislative proposal. Thank you, Mr. Chairman.

Senator DENTON. Thank you, Senator Specter.

Mr. Taylor, if you would resume.

Mr. TAYLOR. Since the Senator has asked me to summarize, I would like to comment on what I think is necessary to prevent the distribution to minors in this country of dial-a-porn services which are either obscene or indecent as to them.

First, I think section 223(b) must be amended or repealed. If it were repealed, then 223(a), which was the prior statute that existed before Congress made the 1983 amendment, could be changed only to clarify that it is for commercial purposes and applies to any person who makes the call or receives the call.

That would take care of the FCC's opinion that it applied only to harassing phone calls or obscene phone calls made by an offender to a victim.

Second, if 223(b) is left in but amended, and if the Congress is serious in keeping children from receiving these messages, then you must do away with the defense provided in 223(b) that the FCC is currently trying to promulgate.

The first attempt by the FCC to promulgate defenses allowed a defense for credit card use, which is probably a good defense, similar to requiring I.D.'s in a bar to prevent children from buying liquor.

The second defense they offered—time channeling to 9 p.m. Eastern time—the court says was not related to the intent of Congress to prevent minors because it is 6 p.m. in California and most kids can stay awake or are around and have access phones after 9 p.m. in New York and after 6 p.m. in California, and that would be 3 p.m. So, obviously, that was not going to be an adequate protection for minors.

I think that even though the FCC reads the second circuit opinion as a concern for the rights of adults, I think that what the second circuit found was that the FCC failed to take the mandate of Congress in protecting minors.

One of the most helpful things the FCC could impose upon dial-a-porn would be the access code requirement, similar to that which cable companies do to require subscribers of theirs to receive their signals and people who do not subscribe to their cable services not to, meaning that dial-a-porn companies could enter into agreements with whoever wanted to receive their services.

Adults could apply for an access code and then when they called the computer, they would have to give that access code for the computer to give them the message. This kind of access requirement was rejected by the FCC because they said that present technology, meaning the present computers being used by the dial-a-porn people, were not set up to do this.

They also noted that Carlin complained that it would be administratively inconvenient for them to have to do this, and they said they should not do anything that would inconvenience the dial-a-porn people.

I think that this kind of pandering to the people who are the intent of the act of Congress has to be removed, and Congress may have to either remove the ability to set up such a defense and to make all persons who provide such calls, whether they are obscene or indecent either to minors or adults, to be liable, or just crimina-

lize indecency as to minors and leave obscenity as to adults to be a separate crime.

This is one way that if the Congress says no person shall provide obscene messages by dial-a-porn services and no person shall provide indecent messages to children by means of a dial-a-porn message, then people in the business of providing these messages will have to be left to their own devices as to how they will prevent minors from reaching it, just like any other vendor in these United States has to decide on his own how he is going to prevent minors from receiving pornographic magazines or having access to pornographic pictures.

I do not think it is too much to ask for the people who are in the business of making the money to decide how to make that money without interfering with the rights of children to be left alone from this kind of material.

I think, as the FCC does, that the words "lewd, lascivious, and filthy" are redundant to this bill. They are old words that have been historically part of most obscenity statutes, and the Supreme Court has interpreted them to mean obscenity.

But the court in *Pacifica* said that they were different than indecency. So the dial-a-porn statute should read, to be clear, a proposal which is obscene or indecent. And I also think that the Congress ought to add to your Senate bill 1090 "for commercial purposes," similar to the way you have it written in the second section that deals with the FCC's power to impose civil fines.

If the criminal statute that would result from amendments would read "in the District of Columbia or in interstate commerce," et cetera, a person who makes any proposal which is obscene or indecent for commercial purposes, regardless of whether the maker placed the call, then the statute would apply to all persons who do this.

If, however, Congress has to somehow accommodate the rights of adults more than the Supreme Court has required you to—and I differ with the FCC on that; I do not think the Supreme Court has ever required Congress to make obscene phone calls available to adults.

As a matter of fact, the Court has said that obscene phone calls are not protected by the Constitution. Therefore, there is no policy that would prevent the Congress from blanket outlawing of obscene messages on the telephone.

I also think that the Congress can outlaw indecent messages on telephones even when not restricted just to minors because as the Court said in *Pacifica,* if mass communications like radio can be subject to an indecency standard to protect the whole public, including children, because of the pervasive impact of radio and its unique accessibility to minors, how much less pervasive are telephones, and how much less accessible are phones to minors?

People have to own television sets and you have to plug them in someplace, and that usually means indoors in someone's home. Telephones are available on almost every street corner in the United States. They also are much more pervasive in that they are a much greater part of the fabric of the United States.

I think, in summary—and if the Senator has any questions, maybe I could come back after Congressman Bliley speaks, but I

think that 223(b) should be amended. It should remove the defense and either make obscene and indecent calls blanket illegal under 223 for commercial purposes, or make obscene calls illegal for adults and indecent calls illegal for minors.

Then the statute, I think, would pass constitutional muster and would do what Congress intended to do in November 1983, which is to keep children from receiving these kinds of calls.

Thank you, Senator.

Senator DENTON. Well, thank you, Mr. Taylor. I will submit written questions to be answered promptly by you, which will be added to the record. I want to make several things clear. I do agree with the suggestion that there be an amendment to insert the word "commercial" to S. 1090, and I am optimistic that the originator, Senator Helms, will agree with that. I do not anticipate any problem.

You, then, differ with the FCC respecting its reservations in one respect. You think that phone systems can be prohibited from offering commercial messages, such as dial-a-porn, if they are indecent, as well as if they are obscene, and do not believe that the first amendment protects indecent commercial speech on the telephone. Is that correct?

Mr. TAYLOR. That is correct. I think that when the FCC says that *Pacifica* is limited only to radio, I think that even though that is the position taken by the ACLU and the pornography lawyers in their briefs—and it sounds like something out of Carlin's briefs that they have been filing against us—I think that the opposite should be the position taken by the Government.

We need advocates on both sides of the table here, and I welcome the opposition of the defense in this country, but I also think the prosecution must take a governmental view of court cases.

The FCC won the *Pacifica* case. The Supreme Court did not define indecency differently than the FCC did, meaning that the FCC had a definition of indecency. The Supreme Court said you can use it as to radio. And they said, why? Because it is a nuisance, because it is pervasive, it is mass communications.

They went further than that and said, well, we recognized that you could not have nudity on television. Therefore, when the FCC in their statements say that the terms "indecent" and "profane" do not apply in radio, television and cable, it ignores all the court cases that the Supreme Court has ever given.

Pacifica stands for the proposition that the Government does have the right to regulate mass communications differently than they do private businesses like bookstores and theaters. Telephone and cable and network broadcasting on television are forms of mass communications only technologically different than radio.

Therefore, the *Pacifica* case should give some encouragement to the Government that the Congress would be allowed to use indecency as a standard for dial-a-porn. Since the Court said that you can protect minors more strongly than you can protect adults, I see no reason why the Court would say that *Pacifica* would not be the same kind of ruling they would issue in a dail-a-porn case.

But until such time as Congress takes the lead in imposing the indecency standard as a blanket prohibition on telephone commu-

nications, it appears that the Federal courts may prohibit the States from doing it, as we are attempting to do in Arizona.

We will take that case up on appeal and, obviously, we think we will win when we go to the Supreme Court. But we think that it may be unreasonable to ask us prosecutors in Arizona to fight three or fours into the U.S. Supreme Court to set a precedent that we can stop dial-a-porn on a local level with an indecent or harmful to minors standard when Congress could do it much sooner, and thereby prevent what has now become a million calls a day reaching the American public, and most of those calls are probably between the ages of 13- and 16-year-old adolescents.

I think that the emergency we now find ourselves in is adequate justification for Congress to take the lead and to rule on it. I can see no reason or any language in Supreme Court precedent that would prevent the Court from saying that the Congress does not have the power to use indecency for dial-a-porn.

Senator DENTON. Thank you very much, Mr. Taylor.

Thank you for your testimony.

Mr. TAYLOR. Thank you, Senator.

[The prepared statement of Mr. Taylor follows:]

PREPARED STATEMENT OF BRUCE A. TAYLOR

Mr. Chairman and Members of the Subcommittee:

My name is Bruce Taylor and I am Vice President and General Counsel of Citizens for Decency through Law, a non-profit organization with national headquarters at 2331 W. Royal Palm Road, Phoenix, Arizona 85021, (602) 995-2600. CDL is the oldest and largest anti-pornography group in the country, having been founded in 1957 by Cincinnati lawyer Charles H Keating, Jr. Mr. Keating was one of the dissenting Commissioners of President Johnson's Commission on Pornography in 1970, and is now Chairman of the American Continental Corporation in Phoenix. Mr. Keating started CDL to do two things. One is to educate the public on the effects and harms of pornography and obscenity and of the issues surrounding legal and legislative regulations. The second is to provide direct legal assistance to law enforcement and governmental agencies. In the Public Education role, CDL works with over one hundred citizen chapters in local communities and engages in extensive public speaking, conferences, media appearances. We also publish a newsletter known as the National Decency Reporter. In the Legal Assistance role, CDL has three full time former prosecutors with state and federal court experience in obscenity and harmful to minors cases. I was Assistant Prosecutor and Assistant Director of Law for the City of Cleveland, and handled over 600 obscenity cases between 1973 and 1978, including nearly forty jury trials and over a hundred appeals, one of which involved arguing before the United States Supreme Court. During that time, 33 of 56 pornography bookstores and theatres closed. Paul McCommon was formerly Assistant Solicitor General for Fulton County, Georgia, and through hundreds of criminal and civil nuisance cases and over a million dollars in fines, all the hard-core porn theatres and bookstores in Atlanta were closed in 1981. Benjamin Bull joined CDL this year after being the Chief Deputy County Attorney in Fairfax, Virginia. In his previous job as Assistant City Attorney in Norfolk, Ben closed 16 of the 18 pornographic bookstores and all Norfolk's message and prostitution parlors.

CDL's attorneys offer free legal advice, research, and assistance to

state and federal prosecutors, hold training seminars for police and prosecutors in investigation and search and seizure techniques, organized crime and industry involvement, evidence and expert witness techniques, and trial and appeal practice. Our attorneys are often asked to co-counsel the prosecution of criminal and civil trials, and to represent police and prosecutors when sued by pornographers in federal courts to challenge state laws, zoning ordinances, or police investigations. CDL has also filed over fifty amicus briefs with the U.S. Supreme Court. CDL is funded by contributions from the general public and reports to the IRS and state agencies on these tax deductible donations.

One of the cases we are presently involved with is in representing Maricopa County Attorney Tom Collins, Attorney General Bob Corbin, and Governor Bruce Babbitt, in the U.S. District Court in Phoenix in a dial-a-porn case of major national significance. Like all the other dial-a-porn cases in the country in the past few years, our case involves Carlin Communications, which supplies the hard-core phone sex messages for High Society Magazine. Carlin began offering its dial-a-porn service in Phoenix in March of 1985, and after the first set of phone bills were received by people in April, complaints began to stream into the County Attorney's office as well as to Mountain Bell phone company because of the numerous calls placed by children to phone sex numbers of Carlin and other companies. Many of the bills were between $200 and $400 and the callers usually in the 13 to 16 age group. The County Attorney began a Grand Jury investigation and notified Mountain Bell that the phone company would be considered equally liable for providing harmful and illegal material to minors. On May 23, 1985, Mountain Bell notified Carlin Communications and the other phone-sex services that it would disconnect them on May 29th. The phone company also filed a federal lawsuit, naming the County Attorney and the message companies, asking for a declaratory judgment as to whether the calls were illegal by being "obscene" or "harmful to minors". On May 29, District Judge William Copple held a hearing at which he reviewed calls made on the services and signed on Order directing Mountain Bell to disconnect at 5:00 p.m. that same day. Judge Copple's Order of May 29, 1985, in Mountain States Telephone & Telegraph Co. v. Save Enterprises, et al., Case No. 85-1329, stated the Court's judgment as follows:

> THE COURT: Well, having read the transcripts that were provided under affidavit by the plaintiff in this case, they are clearly, so far as I am concerned, not protected speech. They are obscene under every standard of the Miller test. They are harmful to minors and available to minors under the Ginsberg test.
>
> The material, taken as a whole, appeals to the prurient interest, according to my view, at least, of community standards, and a jury may find otherwise, if it ever gets to the point -- is patently offensive and, taken as a whole, lacks any serious literary, artistic, political or scientific value.
>
> And I am going to sign the order ordering Mountain Bell to terminate the service until such time as the matter is heard by Judge Rosenblatt on the merits.

On June 3rd, Mountain Bell unilaterally dismissed the lawsuit and announced a new corporate police not to offer any sexually oriented phone services in the future. On June 5, Carlin filed a federal "civil rights" lawsuit against Mountain Bell and the County Attorney seeking damages, attorneys fees, and an order forcing the phone company to carry its dial-a-porn service and declaring inapplicable the Arizona statute governing the illegal providing of harmful matter to minors. On June 6th, Judge Charles Hardy denied Carlin a Temporary Restraining Order and refused to order the service re-connected. Carlin then filed an emergency appeal and request for a writ of mandamus from the U.S. Court of Appeals for the Ninth Circuit, which ordered only that the District Court provide a prompt hearing in the case. Another strange twist changed the lawsuit when Carlin dismissed the County Attorney from the suit upon an agreement that the Grand Jury investigation stop and that Carlin would not seek reinstatement of its service. Carlin then breached the plea agreement by naming the Arizona Attorney General and Governor in its suit against the phone company, seeking to strike down the application of Arizona's harmful to minors statute and requesting an order to force Mountain Bell to carry dial-a-porn. On July 26 and 30, U.S. District Judge Charles Hardy held arguments on motions for summary judgment and will file an opinion and order in the near future.

This is a case of major significance because it involves more than the right of the phone company to terminate illegal and offensive phone-sex services, which Mountain Bell has done since May 29th in its entire seven state network (Arizona, Colorado, New Mexico, Idaho, Nevada, Wyoming, and Utah). The case is important to the public and to Congress because it shows the dilemma we find ourselves in after the amendment to Title 47, U.S. Code, Section 223, in November of 1983. Carlin is challenging, and has been

challenging in several other courts, the validity of state and local statutes as pre-empted by federal communications policy and the FCC, and argues that the intent of Congress in passing Sub-section 223(b) was to provide a "safe harbor" for obscene and harmful to minors materials to be available to "consenting adults" and that the F.C.C. guidelines must protect them from both federal and state prosecution and liability. The new Section 223 is being used as the first example in American history where the Congress has legalized obscenity to consenting adults. Carlin has stated in its briefs and stipulated to the federal court that:

> "In the case at bar, there is no present method by which calls can be screened to prevent the transmission of messages to minors."

To look at the present situation in practical terms, the pornography industry is providing obscene and harmful sex calls to children and the public; the F.C.C. will not enforce any law or regulation against it; the Department of Justice will not enforce any law against it; some phone companies are trying to stop it but are being sued to prevent them from doing so; and the local prosecutors can only hope to prosecute individual violations, if the federal courts do not hold that federal law preempts state regulation and protects such use of the phone networks. Congress truly gave birth to Frankenstein in enacting 47 U.S.C. 223(b). Only Congress can correct the legal and ethical catastrophe now facing this nation.

Before this amendment in November of 1983, Section 223 provided that it was a crime when anyone "makes any comment, request, suggestion or proposal which is obscene, lewd, lascivious, filthy or indecent" by telephone. In 1983, Congressman Thomas Bliley, Jr. and County Executive Peter Cohalan of Suffolk, New York, petitioned the F.C.C. to rule dial-a-porn illegal under Section 223. The F.C.C. referred the matter to the Justice Department. The Justice Department declined to prosecute and requested the F.C.C. to take civil and administrative action. The F.C.C. then issued an Order on March 5, 1984, holding the "old" Section 223 (now 223(a)) applies only to calls "deliberately made to innocent, unconsenting individuals "and that no exception was intended by Congress "relating to calls initiated by children".

Congress then passed Section 223(b) which punishes only calls made by children and received by them. However, the bill also ordered the F.C.C. to

promulgate rules to provide a defense to any prosecution, whether involving adults or children, as long as the F.C.C. rules are followed. In its Second Notice of Proposed Rulemaking of March 1, 1985, the F.C.C. sets out what has happened in this regard. On June 4, 1984, the F.C.C. provided a defense under Section 223(b) that the phone sex calls operate between 9:00 p.m. and 8:00 a.m. Eastern Time (6:00 p.m. to 5:00 a.m. Pacific Time), or that credit cards be required. Many of the worst phone sex services used credit card payments (see the back of Hustler magazine or most any other "men's sophisticate" magazine at the thousands of convenient stores across the country for the numbers), so they were quite happy that they were granted immunity. Carlin, however, operating on the basis of getting a share of the long distance or toll call charges, did not want to operate only after supper and miss the daytime "business" calls. Carlin and High Society magazine challenged those regulations and the U.S. Court of Appeals struck them down in Carlin Communications v. F.C.C., 749 F.2d 113 (2d Cir. 1984). The F.C.C. has already received its second set of comments and will attempt again to provide a defense to dial-pornographers. Meanwhile, the calls to High Society's New York service alone have risen from 100,000 daily in February 1983 to 800,000 in May of 1983. With the addition of local access toll calls to complement the long distance calls to New York City (in New York, California, Michigan, Georgia, Florida, Pennsylvania, Louisiana, Maryland, Washington, D.C., Arizona, Colorado, Oregon, Washington, and Nevada), Carlin has probably received 400 million calls and generated as much as 30 to 50 million dollars. If they themselves admit that there is no technological way to prevent children from making the calls, and are admittedly making no attempt to try, then it is impossible to guess how many children have learned a gross dose of sex miseducation on their parents' unwilling phone bills. Although Carlin claims that it advertises its numbers only in magazines intended for "adults", the grade school and high school children in Arizona have stated that they got the numbers in the school-yard or on the walls of the school bathrooms.

There are attempts going on to stop this public nuisance. On April 25, 1985, the federal grand jury in Salt Lake City indicted Carlin Communications for acts occurring prior to the date that Congress passed Section 223(b) and brought charges under 42 U.S.C. 223(a)(1)(A), 19 U.S.C. 1465 (Interstate

Transportation of Obscene Matter), and 18 U.S.C. 1462 (Using a Common Carrier to Carry Obscene Matter in Interstate Commerce). The federal District Court has pending Carlin's Motion to Dismiss the Indictment, wherein Carlin argues that the old Section 223(a)(1)(A) does not apply since Carlin doesn't "make" the call, that Congress has intended to legalize obscene and indecent calls to "consenting callers" (whether adults or children), and that the obscenity statutes do not apply to dial-a-porn and only the F.C.C. has jurisdiction and that all the F.C.C. can do is provide regulations which grant Carlin a defense to prosecutions.

Some actions have been attempted by certain phone companies, all challenged in court by Carlin. In Carlin v. Southern Bell, the U.S. District Court (N.D. Ga.), Case No. C84-510 (March 21, 1984), denied a restraining order and ruled that Carlin could not stop Southern Bell from disconnecting its phone sex messages. Pacific Bell went to court to try and stop Carlin from using its phone lines, but the District Court in Sable Communications v. Pacific Tel & Tel., (C.D. Cal. Feb. 14, 1984), refused to allow the phone company to terminate service. Only one call was introduced into evidence, and the Court ruled that stopping future calls on the basis of one "obscene" message would be a "prior restraint" on free speech. The Court held the phone company to the same Due Process and procedural requirements as a governmental agency, prosecutor, or court must supply to a defendant. A state court of appeals felt that cutting off dial-a-porn was "state action" by a private, but government regulated, phone company, but held that the phone company could disconnect the dial-a-porn service since these calls had been found obscene, in Carlin v. South Central Bell, 461 So.2d 1208 (La.App. 1985).

These actions are continuing, but so are the messages, and the complaints by parents. The dilemma over the intent of Congress in passing Section 223(b), and the F.C.C.'s attempt to protect the services without burdening the economic well being of Carlin and other dial-pornographers, makes their outcome very uncertain. Congress should face up to the error of its attempt to deal with dial-a-porn and pass a new bill, which could take one of two general directions.

One, repeal Section 223(b) of Title 47, and reinstate the original statute now found in Section 223(a). Clarify its intent by adding that

Section 223(a)(1)(A) is violated regardless of who makes the call as long as obscene or indecent messages are provided for commercial purposes or exploitation.

Alternatively, amend Section 223(b) to remove the consenting adults language from 223(b)(1)(A) and repeal the defense provision of 223(b)(2). This would remove the F.C.C. from determining the protection due to people who are violating the statute and allow the Department of Justice and federal courts and juries to determine offenses and give the ability for the intent of Congress to stop the commercial sex-exploitation of the nation's phone system and its abuse of children.

If dial-a-porn is made illegal in one or both of these two ways, the dial-a-porn will cease. Even if it is only criminalized as to children, but no defense is added, then Carlin and the others will have to assume the burden of contracting with its clients the same way cable companies, credit card companies, and all other public businesses do. It seems a small requirement that a business discover its own ways to make a profit and to avoid breaking the law and harming America's youth and families. Any measure which allows dial-a-porn to continue as it presently exists will provide access by children to pornographic and sexually callous images they will never forget. God only knows what they will think of us "responsible adults", "community leaders", "statemen", and "guiding parents" if we allow this. The Supreme Court expressed two thoughts that we should remember when dealing with this task, in F.C.C. v. Pacifica, 438 U.S. 726, at 743 fn. 18 and 744 fn. 19 (1978):

> A requirement that indecent language be avoided will have its primary effect on the form, rather than the content, of serious communication. There are few, if any, thoughts that cannot be expressed by the use of less offensive language.
>
> * * *
>
> We are assured by Pacifica that the free play of market forces will discourage indecent programming....[T]he prosperity of those who traffic in pornographic literature and films would appear to justify skepticism.

Respectfully submitted,

Bruce Taylor

BRUCE A. TAYLOR
VICE PRESIDENT-GENERAL COUNSEL
CITIZENS FOR DECENCY THROUGH LAW, INC.

Senator DENTON. Our next panel consists of Representative Thomas J. Bliley, Jr., Mr. Lee Hunt, and Mr. Harold L. Cole, Jr.

My distinguished colleague from the Commonwealth of Virginia, Congressman Tom Bliley, has been a leader in the fight against the dial-a-porn problem. Last year, he was instrumental in obtaining passage of certain dial-a-porn legislation which explicitly proscribed obscene or indecent communications made for commercial purposes to anyone under 18 years of age. There seems to be no argument presented by the FCC or anyone else against this objective.

Today we are seeking a more definitive understanding of how the current law operates, with respect to the question of whether new legislation is required.

Through an unfortunate set of circumstances, the proper implementation of Representative Bliley's legislation has been blocked. It is, in part, the purpose of S. 1090 to rectify this situation and to clarify Federal prohibitions against the interstate transportation of obscene or indecent material over the telephone.

To you, Mr. Bliley, I offer you my congratulations for what you have been doing. I welcome you to today's hearing and look forward to your testimony. Of course, your complete written statement will be placed in the hearing record, and you can exercise your own judgment regarding summarizing your testimony, sir.

STATEMENT OF A PANEL CONSISTING OF HON. THOMAS J. BLILEY, JR., A REPRESENTATIVE IN CONGRESS FROM THE COMMONWEALTH OF VIRGINIA; LEE HUNT, MIDLOTHIAN, VIRGINIA; AND HAROLD L. COLE, JR., RICHMOND, VA

Mr. BLILEY. I thank you, Senator. I want to thank you for holding this hearing. I also want to thank you for giving me the privilege of testifying, and also, more importantly, to allow two of my constituents who have had direct experience with this problem to testify as well.

I apologize for having to leave to respond to two votes, and hope that I will finish before I have to go back. With your permission, I would like to submit my full statement, along with a letter that I have sent to the FCC during their current rulemaking process, for the record.

Senator DENTON. It will be placed in the record, sir.

[Letter follows:]

THOMAS J. BLILEY, JR.
7th DISTRICT, VIRGINIA

MEMBER OF
COMMITTEE ON ENERGY AND COMMERCE
COMMITTEE ON D.S.TRICT OF COLUMBIA
SELECT COMMITTEE ON CHILDREN, YOUTH AND FAMILIES

WASHINGTON OFFICE:
213 CANNON OFFICE BUILDING
(202) 226-2815

DISTRICT OFFICE:
510 EAST MAIN STREET
RICHMOND, VIRGINIA 23219
(804) 771-2809

Congress of the United States
House of Representatives
Washington, D.C. 20515

April 19, 1985

Honorable Mark S. Fowler
Chairman
Federal Communications Commission
1919 M Street, N.W.
Washington, D.C. 20554

In re: Gen. Dkt. No. 83-989

Dear Chairman Fowler:

I write this letter in response to the Second Notice of Proposed Rulemaking in the above-captioned proceeding ("Second Notice") that seeks public comments on what kind of regulation to adopt in order to restrict access by children to the filthy, disgusting and explicit tape-recorded sex messages, "dial-a-porn", that are being transmitted by telephone across this country to anyone who calls a pre-assigned telephone number.

I hope that the Commission will read this letter carefully because, as author of the legislation that requires the FCC to promulgate this regulation, I have a deep interest in this matter. Moreover, as the legislation's author, I know as well as anyone what kind of regulation is contemplated by the new law.

Background

The new law requires the FCC to adopt a rule that restricts children's access to dial-a-porn:

> "It is a defense to a prosecution under this subsection that the defendant restricted access to the prohibited communication to persons eighteen years of age or older in accordance with procedures which the Commission shall prescribe by regulation." 47 U.S.C. §223(b)(2).

By order released June 5, 1984, the Commission purported to fulfill this statutory obligation by promulgating a rule that prohibited dial-a-porn between 8 o'clock a.m. and 9 o'clock p.m. Eastern time. See generally Report and Order in Gen. Dkt. No. 83-989 at ¶¶34-41, released June 5, 1983.

On appeal, however, the U.S. Court of Appeals for the Second Circuit nullified the FCC's rule and instructed the Agency to try again. Carlin Communications, Inc. v. FCC, 749 F.2d 113 (2d Cir. 1984).

In response to the Court's decision, the Commission has issued the present Notice of Proposed Rulemaking. I write this letter in response to the invitation for comments contained in that Notice.

I. A Regulation that Merely Prohibits Dial-a-Porn During Daytime Hours Is Inconsistent with My Legislation

In its Second Notice, the Commission has again called for public comments on the desirability of adopting a rule that attempts to protect children by limiting dial-a-porn to specified hours. Second Notice at ¶¶ 23-24.

As the author of the new law, I urge the Commission not to adopt a time-of-day restriction. When my legislation was being considered on the Floor of the House of Representatives, I warned the Commission during Floor debate that the bill required it to do more to protect children than simply confine dial-a-porn to certain hours of the day:

> "Merely limiting the [transmission of a] recording to a certain time of day would not be sufficient [to comply with the new law] for two reasons. First, such limitations would not be effective in preventing children from having access to the material. Second, we are dealing with interstate calls. The territory of the United States spans 6 time zones. When it is midnight in New York, it is only 7:00 p.m. in Alaska and Hawaii. Thus limiting availability of the material to children purely on time-of-day restrictions would leave a window of only 1 or 2 hours daily across the country." Cong. Rec., Nov. 18, 1983, at H 10560-01.

In nullifying the FCC's first regulation, the Court agreed completely with me that a time-of-day restriction was worthless to minimize children's access to these pornographic audio recordings. The Court made three points in this regard. First, it noted that children could "easily pick up a private or public telephone and receive dial-a-porn" when the FCC's rule allowed pornographic transmissions to be made without restriction. Second, it pointed out that the FCC's rule allowed people who transmitted dial-a-porn at night to encourage children to call at night by transmitting a recording during the daytime "suggesting a call-back for explicit sex talk at the appropriate hour and putting youth on notice about when to call back." Finally, the Court thought that a rule prohibiting daytime transmission was not very helpful because few children would call the prescribed telephone number during the daytime anyway since "for the greater part of the year [they are] likely to be in class under adult supervision". Carlin Commun., supra, 749 F.2d at 121.

II. The FCC May Comply with the Requirement of My Bill by Implementing a Regulation that Screens Recipients of Dial-a-Porn by Requiring Each Caller To Provide an Access Number for Identification to An Operator or Computer Before He Is Allowed To Listen to the Recording

In its Second Notice, the Commission also calls for comments on the desirability of a rule that limits access to dial-a-porn by requiring each caller to

provide an access number for identification to an operator or computer before receiving the dial-a-porn message. Second Notice at ¶¶ 19-22.

I previously have informed the Commission that I hope the Agency will promulgate a regulation restricting access to those dial-a-porn callers who provide an operator or computer with the proper secret access code. See my letter dated December 6, 1984, at page 3, a copy of which is attached. I reiterate my support for this approach by the present letter.

Moreover, the Court that nullified the FCC's time-of-day regulation clearly agreed with me:

> "[W]e see no great administrative difficulty in having each person who desired access to dial-a-porn services fill out some type of application form, which would then be sent to the appropriate dial-a-porn message service provider who would have to rely on some system of age verification.18/ Carlin Commun., supra, 749 F. 2d at 123.
>
> 18/ Perhaps a system of age verification would not be necessary. After all, parents do have "substantial control over the disposition of mail, once it enters their mail boxes." . . . An access code sent to a child would presumably be intercepted by his or her parents."

Conclusion

To summarize, a regulation that merely prohibits dial-a-porn during daytime hours is inconsistent with my legislation. But a regulation that screens recipients of dial-a-porn by requiring each caller to provide an access number for identification purposes is consistent with the legislation. I urge the Commission to promulgate a rule of this sort.

Sincerely,

Thomas J. Bliley, Jr.
Subcommittee on Telecommunications,
Consumer Protection, and Finance

Enc.

Mr. BLILEY. And I will summarize as briefly as I can, realizing the demands on your time are stringent—more so, probably, than mine.

Senator DENTON. Please proceed.

Mr. BLILEY. I introduced legislation in 1983 following complaints from parents such as the ones who join me today that their children listened to sexually explicit recordings and that they received phone bills for considerable amounts of money, and in some cases amounting to several hundreds of dollars.

My legislation simply stated that dial-a-porn was prohibited by the 1934 Communications Act, and raised the penalties from $500 to $50,000 and up to 6 months in jail, or both.

Unfortunately, the House Judiciary Committee made last-minute changes which limited the scope of my proposal. They did that because we were in the dying days of a session, and threatened to take the bill for sequential referral which, in effect, would have killed the bill.

So what they did was they applied it to children under the age of 18 and created a defense against prosecution under the act by complying with regulations that the FCC was to promulgate.

Representative Robert Kastenmeier, the chairman of the House Judiciary Subcommittee with jurisdiction over pornography, inserted remarks for legislative history 2 weeks after Congress adjourned in 1983, setting forth the notion consenting adults' right to receive pornography in applying *Butler* v. *Michigan*, which prohibited statutes as unconstitutional that limited adult regulations to reading only material fit for children.

However, dial-a-porn and magazines sales are quite different, in that adult and minor populations can be segregated for purposes of the latter. Dial-a-porn's chief deficiency, as I see it, is that it cannot identify its audience; thus, the need to ban it.

Everything is done electronically. There is no way to screen who is calling or where they are calling from. With digital phones as easy to access as they are in this country today, there is absolutely no way a concerned parent can keep their child away from that phone or access to this message.

The FCC, in promulgating its regs, contemplated three options. One, require the phone companies or the parents to block or screen calls by placing the onus on the individual rather than on the seller. I felt that this was unfair because in order to do this, the individual would have to pay a fee. He should not have to do that.

Second, they could require dial-a-porn to require an access number or a credit card or other access code. That is the idea that I supported then; I support that idea now. If they have to require an access code, you eliminate children because children do not have credit cards, or if they do, their parents give them to them. And if they give them to them, then they accept responsibility for all that follows.

Number three, they could follow the *Pacifica* decision, which allowed the FCC to regulate by means of hours. That is exactly what they did. I warned them at the time that it would not work because of two reasons.

First of all, the multiplicity of time zones that we have in this country makes it very difficult. Second, you enable the would-be of-

feror of the service to put a tease on when the hours are banned, saying call back at such-and-such a time for a message or whatever. This just encourages it.

Kids do not go to bed at 9 any more, if they ever did, but they certainly do not now. The appellate court, of course, knocked it down and the FCC is back at the drawing board, which is another reason I am glad for this hearing.

In my opinion, the FCC has dragged its feet from day one on this issue. Everybody agrees that it is terrible, but for some reason unknown to me, unexplained, they refuse to act, and I think it is reprehensible.

There is a need, in my opinion, for legislation now to overturn the language which might enable judicial interpretations favorable to consenting adult's right to receive pornography over the phone lines. We need to update the Court's decision in *Butler* v. *Michigan*.

I hope, working with you, Senator, and others, to introduce legislation on the House side to address this problem shortly after the recess.

In closing, I want to thank you again for having me, and I would like at this time to introduce to you Mr. Harold Cole from my district and Mr. Lee Hunt, who have testimony from the viewpoint of parents with minor children and their experience with this pornography via phone, commonly known as dial-a-porn.

Thank you, Senator.

[The prepared statement of Congressman Bliley follows:]

PREPARED STATEMENT OF HON. THOMAS J. BLILEY, JR., MC

Mr. Chairman, Members of the Committee, I want to express my appreciation for having the opportunity to appear before you today. I also appreciate the opportunity you have afforded the Cole and Hunt families in inviting them to appear before you. I find this latter opportunity especially significant, for it was the concern of the Cole and Hunt families, and myriad others, which led to my original involvement with legislation the aim of which was to protect us and particularly our children from the "dial-it" services which are used to purvey pornography.

For the Committee's information, there are basically three (3) types of "pay-per-call" services of which I am aware. The first is a subscription type, wherein the caller punches in an access code on his telephone's key pad. This service is billed by the provider to the subscriber on a monthly basis. The second type is the "900 Number", a "mass listening" arrangement where by dialing a number with a 900 area code, the dialer and countless other dialers have access to one number, and usually generate a fifty-cent per one-minute charge. The third type, and the type with which I am most concerned, is the "dial-it" service. This last service is a telephone line with a "976" prefix which is operated by private parties, yet uses public telephone lines and collects its revenues through public telephone billing and collections processes. "Dial-it" services are tape-recorded messages, and, as such, are openly accessible to anyone with access to a telephone, including minor children.

Shortly after the Federal Communications Commission (FCC) ordered that local telephone companies should stop providing recorded messages or "enhanced services" which private companies could supply as of January 1, 1983, the first "dial-a-porn" service came to my attention. It was not long after that FCC effective date when Car-Bon Publishers, publishers of the pornographic "High Society" magazine, and Carlin Communications initiated their service in New York. Callers were given access to several messages per day, each describing lewd and lascivious sexual acts, and the depictions were graphic.

Parents were outraged to discover enormous long-distance telephone charges which resulted from frequent calls to the 976 pornographic dial-it number in New York. It was not long thereafter that the title "Dial-a-porn" came to be attached to this service, and that I received the first reports from my constituents and from concerned parents around the United States about the filth to which their children were being exposed.

At approximately that time in the February, 1983, the County of Suffolk, New York, filed suit to have this operation stopped, alleging a violation of the 1934 Communications Act. That Act prohibited the interstate transmission of obscenity. I sided with the complainant. The FCC, in response, maintained that since the Act provided criminal penalties for interstate transmission of obscenity, the prosecution of the pornographers more appropriately resided with the U.S. Justice Department, in May, 1983. In June, 1983, the Justice Department referred the matter back to the FCC, stating that the Commission could better stop this dial-a-porn operation via administrative proceedings. It was not until September, 1983, however, until the Commission began an inquiry into enforcement of the prohibitions under the Act.

By this time, I had written legislation which had been incorporated into the Federal Communications Commission reauthorization legislation (H.R. 2755, 98th Cong.) which sought to protect our children and ourselves from dial-a-porn by clarifying that the interstate transmission of obscenity was prohibited, whether the violator placed the call or a recorded message was accessed. The language of my amendment, adding a new subsection to Sec. 223 of the Communications Act of 1934 read:

> Whoever . . ., by means of telephone, makes (directly or by recording device) and comment, request, suggestion, or proprosal which is obscene, lewd, lascivious, filthy or indecent, regardless of whether the maker of such comment placed the call, . . . shall be fined not more than $50,000 or imprisoned not more than six months, or both.

However, on the last day of the legislative Session of the House in 1983, that being November 18, 1983, the text of this provision was replaced by language drafted by the House Judiciary Committee. This language, without which, the legislation would not have passed the Congress, owing to the lateness of the Session and the threat of sequential referral to the House Judiciary Committee for review,

significantly limited the coverage of my proposal by prohibiting only obscene or indecent speech; only transmissions to persons under eighteen years of age; and, only speech made for commercial purposes. The final version of H.R. 2755 further required the FCC to promulgate regulations indicating methods by which dial-a-porn services could screen out underage callers, and specified that compliance with such regulations constituted a " . . . defense to a prosecution." The President signed this legislation on December 8, 1983 (Public Law 98-214).

I would like to point out for the Committee that, while it was my intent primarily to protect children from being exposed to pornography, it was not my intent that this law should legalize the interstate transmission of obscenity for anyone. It is my unfortunate understanding that the amendments made to my language in the FCC Reauthorization legislation have the effect of authorizing and legalizing the concept of "consenting adults" as having a right to receive pornography. Clearly, the courts have not accepted such a concept. Quite to the contrary, the courts have consistently held that obscenity is not protected by the First Amendment, Chaplinsky v. New Hampshire 315 U.S. 568 (1942); Roth v. United States 354 U.S. 476 (1957); Paris Adult Theater I v. Slaton 413 U.S. 49 (1973). In Slaton, the Court declined to nullify an obscenity conviction on the basis of a concept of "consenting adults" having a "right to receive" pornography.

In promulgating its regulations, the FCC has followed the Supreme Court's affirmation in FCC v. Pacifica 438 U.S. 726 (1978) that it could regulate and impose time-of-day restrictions on a medium such that its hours of operation would be limited to those during which parents would most likely be home and available and able to supervise their children. I stated during House consideration of H.R. 2755 that "The ruling in Pacifica clearly affirms the FCC's ability and authority to examine material to determine whether it is obscene or indecent and to assess fines on that basis." Indeed, the U.S. Court of Appeals for the Second Circuit quoted that statement in applying the indecency standard in Pacifica to dial-a-porn, even in overturning the FCC's regulations.

The FCC erred in its regulatory procedure by adopting an approach to limit dial-a-porn based on time-of-day restrictions, however, because

it cannot be accomplished that time-of-day restrictions can successfully guarantee that no child will be exposed to dial-a-porn messages. I believe that the FCC erroneously attempted to implement a regulation which had as its underlying premise a balancing of interests between the interests of dial-a-porn operators and the court-affirmed authority of parents to protect their children from pornography. Such an attempt falsely assumes that pornography represents a legitimate interest capable of overriding parents's rights and responsibilities. It was that focus, and the idea that somehow "consenting adults" access to dial-a-porn must be protected which resulted in the FCC's ill-fated original regulations. These regulations were issued last June, 1984, and were subsequently set aside by the Court of Appeals, which held that the FCC had not adequately supported the reasons for its actions, nor developed the public record sufficiently to support those actions. Since that action, dial-a-porn has resumed full operations, and continues to expose the entire population to its pornographic messages. The FCC has subsequently issued its Second Notice of Proposed Rulemaking in this proceeding, and has received Public Comment. I anticipate that the FCC will soon bring forth new regulations designed to meet the requirements of the 1983 law. At this time, I would ask the consent of the committee to insert into the committee's hearing record my comments to the FCC re: that proceeding, dated April 19, 1985. (attachment)

In this letter, I point out to the FCC that time-of-day limitations were not contemplated by the law, inasmuch as they are insufficient to prevent access to all minors. In its original NPRM, the FCC suggested three potential courses of action. The first was to require that a screening or blocking device be required. Such a device could either be placed on an individual's telephone and set to lock-out certain numbers from being dialed. I opposed this suggestion since it erroneously would have placed the onus on the family rather than the pornographer. A blocking device could also be implemented by the local telephone company, which would block access to any lines to an individual's home for numbers which the individual would chose. Again, I opposed this approach since it would have transferred the onus to the telephone company and to the individual, who would have had to constantly monitor new dial-it services, and notify telephone companies of the lines it wanted blocked.

The FCC's second potential response was the concept of an access number, which could be either a credit card, which are not routinely available to minors, or a code issued by the pornographer and used by the caller when placing the call. This is the approach I supported, and continue to support, because it would have the practical effect of screening out minors, and, because dial-a-porn generates its revenues from sheer volume of calls -- some 800,000 per day in the month of May, 1983 alone; and approximately 180 million in the year ending in February, 1984 -- such a requirement would slow the number of calls which dial-a-porn could handle to a trickle, reducing its profitability in the extreme.

The FCC chose its third potential response, however, that of limiting the hours dial-a-porn could operate, even though the legislative history on this law, while affirming the Pacifica decision, expressly noted that time-of-day limitations would not be sufficient to meet the mandate of the law. In practice, limitations on hours of operation have accomplished little. First, the dial-a-porn operators used the sanction of the federal government as a blessing in introducing their messages. Second, the substitute messages were also lewd, and invited callers to call back when operations were not limited. And, third, the limitations on hours of operation did not take into account the several time zones across the United States, and therefore continued to expose minors on the West Coast during daylight hours even past 9 pm on the East Coast.

It is my hope that the FCC will properly implement the access code option to meet the mandate of the law, and will bring forth its regulations soon.

But beyond that, I continue to see the need for legislation. There are several reasons I feel this way. First, the Congress has established a dangerous precedent by legalizing the concept of "consenting adults" right to receive pornography; a concept which has not found its way into law in any form previously. I believe that we need to act on this front, and I intend to introduce legislation in the House to accomplish this end.

On a legal basis, I believe that Representative Robert Kastenmeier, Chairman of the House Judiciary Subcommittee on Courts, Civil Liberties

and the Administration of Justice, erroneously cited thecase of Butler v. Michigan 352 U.S. 380 (1957) in seeking to explain why the FCC could not ban dial-a-porn outright. The reasoning, according to Butler, was that statutes having the effect of preventing adults from having access to materials judged to have a potentially deleterious effect on children were unconstitutional, in that such statutes would have the effect of reducing the entire population to consuming only that which is fit for children. I believe Rep. Kastenmeier, who, incidentally, did not deliver his remarks for legislative history on the House Floor, yet waited a significant period of time before submitting them for the permanent House record, erred in seeking to apply Butler, in which it was proven that the adult population and the minor population were segregable, to dial-a-porn, where it is impossible to identify whether the caller is an adult or a minor child.

It is my concern and my hope that a rethinking of Butler can be devised to govern the numerous new technologies which have the potential of reaching massive audiences, yet have no way of identifying those audiences. The Congress must pass legislation to accomplish this end.

In the end, Mr. Chairman, I believe the public will be best served if we, as its servants, approach telephone pornography with the idea that the message, not its mode of transmission, is determinant of a violation of obscenity standards.

Again, I thank the Chairman and the Members of the Committee. I look forward to working with the Members toward the goal of protecting the public health and safety from pornography and its effects.

58-804 O - 86 - 4

Senator DENTON. Thank you, Congressman Bliley.

At this point, before we hear from the parents involved, I would like to try to separate out some of the issues with which we are dealing. They are not simple. There is no desire on the part of this Senator to abridge the constitutional considerations regarding the first amendment by imposing more restrictive regulations than the first amendment would allow.

On the other hand, this Senator is not interested in having an assumed interpretation of the first amendment which is erroneous, and there have been a number of statements made today which imply that kind of an assumption.

What I am referring to is the fact that the United States Supreme Court has consistently held that the first amendment does not protect obscenity and that there is no constitutional right to transmit obscene materials to consenting adults or to anyone else.

Of particular relevance is the United States Supreme Court case *Paris Adult Theater* v. *Slaton*, decided in 1973, in which the Supreme Court held that the first amendment did not give consenting adults a constitutional right to receive obscene materials.

Now, that is not just my assertion of how things should be. That is my understanding of what the law is.

If that is incorrect, I want somebody to correct me because we are supposed to be a "nation of laws."

The *Paris Adult Theatre* case authorized State control of obscene materials. Federal control of interstate transmissions of obscene materials was held to be constitutional in the companion cases to *Miller* v. *California* decided in 1973.

I think at this point, considering the context of the hearing and the patience of the media and the important contribution they will make in transmitting the results of what has gone on today, that point should be established. That is what the law is.

For us to be lulled into the belief that consenting adults can receive commercially or otherwise obscene materials by virtue of the Constitution and that such activity is protected is simply a wrong assumption, and we are being lulled in that direction.

I am not saying that we should not accede to that interpretation or that we cannot change it, but I am saying that is the way the law is now. As much as I agree with Congressman Bliley, everyone does not agree that pornography is bad.

I would dare say that the vast majority of our respective constituencies and the vast majority of the American public believe that pornography is bad. But there are many who are conscientiously convinced that consenting adults should be permitted to view anything they want to, obscene or not, and I have to recognize that fact.

That does not mean that that is the way I am going to direct my legislation, but that is, I believe, a fact.

Our next witnesses are Mr. Lee Hunt, of Mithlothian, VA, and Mr. Harold Cole, of Richmond, VA. They are constituents of Congressman Bliley, who registered complaints with his office over the unrestricted availability to children of dial-a-porn services after discovering, through their telephone bills and other means, that their children had made numerous calls to a New York City dial-a-porn number.

I welcome their testimony and would suggest Mr. Lee Hunt go first.

Mr. HUNT. Thank you, Senator; thank you for this opportunity.

I have consented to testify on behalf of Congressman Bliley's office in favor of his support for stricter legislation against dial-a-porn obscenities because of a personal involvement.

My 12-year-old son, John, was involved in an extended telephone pornography incident. Briefly, in explanation, John was given the number of a dial-a-porn service in New York City by a friend we had visited in Chicago. My son, in turn, passed the number to Mr. Cole's son and others.

For a brief period, the boys enjoyed the mischievous thrill of the explicit recordings. My first reaction was, oh, well, boys will be boys. However, it was only after confrontation, discussion, discipline and punishment of my son that I realized the consequence of our experience.

Today's society has placed a tremendous strain on the American family; whether it is inflation, recession, taxation, global conflict or dial-a-porn really makes little difference. As a single parent with a deep concern for the well-being of my sons, my family, my friends and our way of life, I strongly urge the passage of legislation which will prohibit and/or control the implementation and use of dial-a-porn systems which are now available to minors.

We have legislation which provides control for young drivers. We have legislation which controls the drinking age. We have legislation which controls the sale of pornographic literature to minors. Let us be consistent and put some control on dial-a-porn.

We all realize that our Nation operates on the democratic principles of free enterprise, but not at the expense of others, especially our children.

Thank you very much.

Senator DENTON. Thank you, Mr. Hunt.

Mr. Harold Cole.

Mr. COLE. Thank you, Senator Denton and Congressman Bliley, for inviting us here today. I have consented to come as a concerned parent, also, of a 12-year-old son who was involved in a dial-a-porn incident.

I first became aware of the situation when reviewing the telephone bill from C&P Telephone Co. in January 1984. The bill reflected numerous calls to New York City, ranging from 50 to 75 cents each.

After questioning several of the family members, including several of the older children and my wife, about the calls to New York, I finally got down to 12-year-old Andy and he said that he had been calling New York to get information on what concerts would appear on HBO.

I took the answer and, later, after thinking about, I recall reading the paper about the work that Congressman Bliley was doing on the situation of dial-a-porn. I took it upon myself to call one of the numbers on the phone bill and, sure enough, as I anticipated, it was the dial-a-porn number.

I then confronted Andy with the situation and he told me what it was and was obviously very upset. He was reluctant to tell me where he had received the number. He finally said he had received

it from John Hunt, and Lee Hunt who is testifying today is a close friend of the family.

I called Lee and discussed it with him and suggested that he check his phone bill. Shortly thereafter he called me back and he was amazed that there were between 50 and 60 phone calls to New York on his phone bill.

Since then, the boys have reimbursed the families for the phone calls. We have had long discussions about it and both boys are aware that Lee and I are both here today and what we are doing here today, sanctioning us being here.

To the best of my knowledge and to the best of Lee's knowledge, we have not experienced any further phone calls since that time. After that time, I had talked with other parents and I was appalled to learn from a younger brother who has a 9-year-old daughter who was 9 years old at the time—that she had gotten the number from children at school and had actually called and heard the same things that our boys had heard.

Senator DENTON. You mentioned in your written statement that the 9-year-old daughter may have been involved in making numerous calls to New York.

Mr. COLE. There were numerous calls on my brother's phone bill, also.

Summing it up, my feeling is the same as all of us who discuss this that this type of thing should be somehow limited to adults of 18 years or older. We presently have legislation controlling and restricting the drinking age, the driving age, admittance to x-rated movie theaters and adult bookstores. Why not dial-a-porn?

Thank you.

Senator DENTON. Thank you, sir.

We will include, as I said, Congressman Bliley's entire testimony, if there is further, in the record. And we will work with you, Congressman Bliley.

We have not finished examining this issue to discover the best thing that we can do, what things we need to do, and what things already have been done. But I do believe at stake are the pursuit of happiness, the general welfare, and the consideration that civilization cannot exist without a substantial family life; because the family is the basic social unit of the Nation.

All of us are fallible, and are subject to the forces present in society. To what extent do we wish to permit or encourage the growth of destructive influences which make it difficult to form committed marriages and raise children to be responsible individuals, who are themselves capable of forming committed marriages.

We are permitting pornography to commercially intrude on that process as a destructive influence. The way to deal with them presents a good set of questions. We must be very deliberate and considerate about how we do it.

I do think that the solution to various social problems, such as the divorce rate and the increasing illegitimacy in our society lies in the direction of our being honest with ourselves regarding regulation of these destructive influences in accordance with the Constitution—the Supreme Court rulings, as well as the first amendment.

The Founding Fathers did not intend to protect pornography. The principle that obscenity is not protected by the first amendment has been upheld by the Supreme Court over the years.

In order to combat this social problem, we need to stop worrying about whether we are Democrats or Republicans, liberal or conservative; and together we must examine this subject and see what we can do about it.

Thank you, Mr. Bliley, very much. Thank you, Mr. Cole. Thank you, Mr. Hunt.

Mr. BLILEY. Thank you, Senator.

Mr. HUNT. Thank you.

Mr. COLE. Thank you.

Senator DENTON. The next witness is Mr. Barry Lynn, legislative counsel for the American Civil Liberties Union, and we welcome Mr. Lynn to the hearing.

I assure you, Mr. Lynn, that your complete statement will be placed in the record and I ask you to summarize your testimony, if you can, within 15 minutes.

STATEMENT OF BARRY W. LYNN, LEGISLATIVE COUNSEL, AMERICAN CIVIL LIBERTIES UNION

Mr. LYNN. Thank you very much. With all due respect, Mr. Chairman, of your own sponsorship of this bill, frankly, efforts to regulate cable television's content or the content of telephone communication are, in our judgment, two more very significant steps in a disturbing rebirth of censorship in the United States.

Some Americans seem to have an extraordinary interest in using the judicial system to curtail the rights of their neighbors to receive whatever information they choose in the privacy of their own homes.

There may well be a quite natural impulse to get rid of all of those images and ideas that we encounter which offend us. However, the first amendment requires that we abandon suppression and replace it with personal rejection, coupled frequently with public rebuttal.

Now, certainly, the Supreme Court has carved out several exceptions from the first amendment for certain forms of sexually-oriented speech in both *Roth* v. *the United States* and in *FCC* v. *Pacifica Foundation*.

It is no secret that the ACLU does not approve of these decisions. In summary, we believe that sexual speech does contain ideas, albeit frequently offensive ones graphically disseminated, which ought to be accorded constitutional protection.

Likewise, the standards in *Miller* and *Pacifica* are hopelessly vague and overbroad, casting a chill on sellers, producers, and broadcasters who need to fear that particularly sensitive or particularly zealous persons will be offended and seek legal recourse.

It is also useful to recall in talking about constitutional law that rational discourse is not the only speech protected by the guarantees of free expression. The Supreme Court has held that even deliberately shocking emotional slogans and entertainment are accorded significant first amendment protections.

In addition to protecting even emotionally-charged entertainment, the first amendment commands that the protection of children not become a catch-all justification for the curtailment of the rights of adults.

As Justice Frankfurter noted in striking down a statute which prohibited the sale of books "tending to the corruption of the morals of youth," the risk it presented was to reduce the adult population to reading only what is fit for children.

So in light of all of these constitutional considerations, I would like to focus on why the *Miller* and *Pacifica* holdings themselves do not permit broad intrusions into the distribution of sexually-oriented material on either cable television or over telephones.

Senate 1090 is an effort to restrict the content of cable and telephone communications in an unconstitutional manner. Legislation could, however, be developed which would enhance parental control over televisions and telephones without abridging first amendment values.

Turning first to cable, this bill provides extreme criminal and civil sanctions against whoever utters any obscene, indecent or profane language by means of radio or television, including cable television.

From floor statements already made in support of this measure, it appears that Senator Helms, its primary sponsor, intends to reach material which rejects, in his words, "the tradition which binds human sexuality inseparable to marriage and sees its roots in the family," or, also quoting Senator Helms, "which shows depictions of nudity and sexual intercourse, explicit homosexual activity, actual violence toward animals, and other degrading scenes."

Now, any effort to ban all indecent or profane programming on cable clearly runs afoul of the first amendment. It goes beyond the very narrow ruling in *Pacifica* which permits restriction—not suppression, but restriction—of the hours of certain communication which consists of repetitive indecent comedy monologues transmitted to both unwilling adults and children at certain times of the day through this extraordinarily pervasive medium of broadcasting.

Several Federal courts have already looked at the constitutionality of ordinances very similar to the cable-porn provisions of Senate 1090 and have uniformly held them to be in violation of the first amendment.

These courts found cable a medium quite distinct from broadcasting. Cable does require paid subscription by the user and it is the subscriber who holds the ultimate power to terminate his or her subscription.

Although a car driver meandering through the mountains may have a very limited number of radio stations to twist the dial toward, the cable subscriber in nearly every market has at least 35 channels to choose from and, in many cases, over 100.

The essence of cable programming is choice—the right of the viewer to decide what he or she desires to see. And, in addition, virtually all cable systems send out in advance monthly guides which help viewers avoid unpleasant programming surprises.

It is not even clear that obscene programming over cable may be prohibited. In *Stanley* v. *Georgia*, the Supreme Court held that

even obscene material may be viewed in one's own home. It said: "If the first amendment means anything, it is that a State has no business telling a man sitting alone in his own house what he may read or what films he may watch."

Now, admittedly, the Court has also held that the privacy interest in the home does not mean that all means of distribution are protected, Mr. Chairman, as you mentioned, in the *Slaton* v. *Paris Adult Theater* case.

But it is also true that cable television programming is distributed quite differently than books or eight millimeter films or motion pictures. The transmission of cable is from one private place, a studio, to another private place, the home.

There is no public transfer or marketing of the product through such a facility as a store or a theater. Moreover, even if obscene material can be proscribed, indecent or profane transmissions cannot be. To reach such programming would be to effectively bar virtually every R-rated and many PG-13 and PG-rated films from cable, depriving viewers of one of the principal reasons for purchasing the service.

It is not just the cable operator whose first amendment rights are violated, but also the rights of millions of viewers who, for better or worse, currently enjoy these services.

Turning now to dial-a-porn, there are two forms of dial-a-porn services—sexually-oriented conversations with live operators, and brief tape conversations accessible through 976 numbers in several cities.

But this bill is frankly designed to reach all commercial forms of dial-a-porn, and to go even further by barring any interstate communication which is a comment, request, suggestion or proposal which is obscene, lewd, lascivious, filthy or indecent.

Because there is no requirement that the calls be made for commercial purposes, even a conversation between two married persons discussing a future sexual encounter, which a judge or jury thinks is filthy, would be liable for fines of up to $50,000 or imprisonment for up to 6 months.

Now, the Constitution does clearly prevent any governmental control over even obscene communications in the context of the telephone. The Supreme Court, in the *Miller* test, which has been discussed several times today, notes that the three-pronged test in *Miller* will "provide fair notice to a dealer in such materials that his public and commercial activities may bring prosecution."

Although dial-a-porn has a commercial purpose——

Senator DENTON. Mr. Lynn, would you please repeat the statement about the Supreme Court?

Mr. LYNN. I said that I think you can distinquish the——

Senator DENTON. No; you said the Supreme Court clearly forbids something and I would like for you to repeat that statement.

Mr. LYNN. I think that the first amendment—I am summarizing my own statement, so I must apologize. I am not sure precisely what words I just used.

Senator DENTON. I think you said something like the Supreme Court clearly forbids prohibition of obscene communication for commercial purposes over a telephone.

Mr. LYNN. Over telephones. What I mean is that there is a distinction that can be drawn, and we feel must be drawn, between the *Miller* test, which was relating not to communication over telephones but to other forms of dissemination of obscene material—I think there is a distinction that can be drawn because the Supreme Court, in *Miller,* talked so seriously about the public impact.

Senator DENTON. Would you cite a case in which that distinction has been addressed by the Supreme Court?

Mr. LYNN. I think it is the absence of the discussion that is important here. They have looked at books. They have looked at motion pictures and theaters, but they have never resolved the question of obscenity because, frankly, until several years ago there was no dial-a-porn; there was not a service that could be——

Senator DENTON. But the principle of the Constitution not protecting obscenity has been upheld repeatedly by the Supreme Court.

Mr. LYNN. It has.

Senator DENTON. Why would they make an exception in the case of a commercially run obscene telephone network? I do not quite understand the justification of your premise.

Mr. LYNN. Well, the distinction is that there is not a public distribution of these so-called dial-a-porn messages, and that, I think, is an important piece of the *Miller* decision.

In other words, it has a commercial purpose, but it cannot in any reasonable way be labeled public. The communication in dial-a-porn is between parties facilitated by a totally automated electronic switching system which does not involve even a third party to the extent of a letter carrier.

Senator DENTON. Such as the 9-year-old daughter and the man at the end of the phone in New York?

Mr. LYNN. Well, I certainly would like to address the question of children in just a moment, but here I am just talking about the general principle for adult communication.

I do think it is quite different to have a communication over the telephone than it is to have a motion picture or a book distributed at the newsstand, and I do think that the Supreme Court would be willing to make such a distinction because this is the Court which has even held that a phone call from a pay phone booth is considered a private conversation; that there is something uniquely private about your decision or my decision to pick up that telephone and call anyone, even a dial-a-porn service.

Senator DENTON. But the phone company in that case is not profiting from obscenity, and you have just repeatedly said that the reason people buy this material is because it is pornographic. It is not a parallel case. The phone company gets the quarter, or whatever, for the telephone service. What goes on between the two individuals is not commercially profitable, if it is obscene, to the telephone company.

Mr. LYNN. Well, it is commercially viable for both the telephone company and the provider of the service. But as I read *Miller,* it requires that it be not only commercial, but also public, and this is where I would draw a distinction. Conversations on the telephone are uniquely private.

You know, there are no unwilling listeners to a dial-a-porn message. Anyone who dials that number knows precisely what he or she is going to listen to, and I think that is a very important distinction between picking up a magazine——

Senator DENTON. If it is undeniably obscene, I do not believe it is protected by the Constitution, nor any ruling from the Supreme Court. I am advised that you may be thinking about a fourth amendment case, not a first amendment case.

Mr. LYNN. Well, the *Katz* case that I cited in regard to pay telephones happens to be a fourth amendment case, but the important issue there is whether there is an expectation of privacy when you use a pay telephone to make a phone call.

The Supreme Court said you do have an expectation of privacy, and therefore wiretapping must meet normal constitutional standards.

I think that in the discussion this morning, there have been frequent reference to the *Carlin Communication* case, which overturned existing FCC regulations on dial-a-porn. Even though this is dicta—this is not the holding of the case, which did not reach the ultimate constitutional question—the court in the *Carlin* case noted that it may well be that the Supreme Court's holding in *Pacifica*, the indecency case, is inapplicable outside the broadcast context.

So there is a developing weight of opinion to suggest that even if you can cover obscene material over the telephone—even if your sense of the law is correct on that—that indecent conversations face yet another constitutional hurdle.

Senator DENTON. I did not say that you could control obscene conversations on the telephone. I said commercial operations, when they are originating for that purpose, I believe that it would be against the law.

Mr. LYNN. I understand, and I think from your previous comment that you would be willing to alter this bill as it now reads to refer only to commercial purposes. I do not think that it is always useful to make these distinctions about first amendment issues on the basis of who profits or how big the industry is. We hear that a great deal.

There was a time between the issuance by the Federal Communications Commission of the original dial-a-porn regulations and the determination of the unconstitutionality of those regulations by the second circuit when dial-a-porn providers, in keeping with regs, ceased to provide sexually explicit messages between the hours of 8 a.m. and 9 p.m.

I felt dutybound to find out what was happening when you dialed the dial-a-porn numbers in midafternoon, wanting to find out what replaced the sexually oriented messages. What I heard one afternoon was a message by a female voice indicating that she was an oak tree who understand that the caller was a woodpecker.

The voice seductively inquired whether the caller would like to "come into my branches to peck." Now, the tone of that message was unmistakably sexual, and if some of the words were replaced by common and obviously sexual ones, the message would be precisely what would be intended to have been prohibited by the original statute.

Senator DENTON. I grant that point, but if you want to get an idea of what is the content of dial-a-porn, we have transcripts of recordings if you care to look at them. They are not oak trees and woodpeckers.

Mr. LYNN. No, they are not, but I just do not think that the FCC or the Federal courts really ought to be in the business of trying to figure out if anonymously spoken words, whether they purport to be about birdwatching or about intercourse, are impermissible for adults to hear.

Now, there remains that special question, the important question of what do you do about children in regard to cable television, even if you buy my premise about adults. One of the realities of technological advances is that they sometimes breed their own solutions to the alleged problems they generate.

In this regard, certain improvements in cable and telephone technology actually enhance parental control over their children's information gathering. Since even possession of obscene material is protected in one's home, the possibility of a child dialing a number or turning into an R-rated film should not be allowed to bar the service any more than the possibility of a child finding a father's copy of Hustler in a closet justifies stopping the sale of that magazine at the newsstand.

Parents do have a right to regulate the access of their children to all kinds of material which they consider offensive. But the best solution is not the curtailment of the service for all persons.

Parental purchase of a screening device is a constitutionally acceptable substitute. At least one company, I understand, Telecommunications Technology Corp., has already obtained FCC approval for marketing a minicomputer which uses the telephone dial as a keyboard for inputting instructions that enable users to block calls to any combination of digits and exchanges except for the 911 emergency number.

Through use of this device, parents can guarantee that only those whom they choose to tell the unlocking code may dial exchanges they believe contain inappropriate material. Likewise, the Cable Communications Policy Act requires that every cable operator provide, upon request, a lock box capable of restricting access to any channels which any parents consider unsuitable for their children, whether that is Music Television, the Playboy Channel, or the Christian Broadcasting Network.

You cannot in our society shield children from every possibility of seeing a sexually suggestive image or idea unless you have complete governmental regulation of all communication, to say nothing of regulation of the material that people can wear as clothing on the beach.

Young people will, I suspect, always be interested in the topic of sex, and dial-a-porn has, for some, become the electronic equivalent of looking up dirty words in the dictionary.

Children who do have an encounter with the exposition of sexual values which are offensive to their parents are not likely to be ruined forever by the experience. There is nothing magical about dial-a-porn or R-rated movies. They neither replace the values taught before a young person encounters them, nor prevent par-

ents, schools, churches, and other institutions from successfully combating the values that such messages and films promote.

Under the ACLU's understanding of the first amendment, the remedy for rotten speech, pornographic or otherwise, is always competition by quality alternative speech presented by other people and institutions.

Senator, I do not think we need Senate 1090 to protect our children, and we should not have it if its purpose is to simply affect or alter the values of adults. I hope that you will seriously consider your support for this measure and perhaps decide that this is not the kind of regulation that we ought to have in a free society.

Thank you.

Senator DENTON. Well, thank you, and I welcome your argument. Candidly, I would be more impressed with the ACLU's libertarian interests were they to take up the torch to protect the rights of the hundreds of runaway and abused children who are processed through Covenant House in New York City.

The aim of that house, of Father Ritter and his support staff is not to save those children from harm. They have already been harmed psychologically and physically beyond imagination. They are simply trying to keep them from committing suicide. Let us look at reality. You say that there is no harm to any of this. Flying in the face of that are studies by sociologists, psychiatrists, and other experts that these materials are harmful. Reports from the media have questioned what is happening to society. These things are happening as a result of this new so-called permissiveness, which in many cases represents violations of law even by your definition.

Not to answer the people who say that there is a great problem being introduced by these materials, I believe, would be a dereliction of duty.

You characterized the whole thing in terms of freedom of individuals to receive information. Let us take the opposite side of the coin: the situation where someone cries fire in a crowded theater.

There is no first amendment issue involved regarding the right of those individuals in the crowded theater to hear the cry. You are not supposed to give everybody earplugs in the theater.

The question is whether the first amendment protects the right of the man to cry fire. If he is doing harm that way, then he should be prohibited from doing that. That is another characterization of the situation we are addressing here.

Mr. LYNN. Could I respond to that analogy, Senator Denton?

There are two things about that analogy of crying fire in a crowded theater. First of all, nothing, I think we all agree, is wrong with crying fire if there is indeed a fire. Then everyone, in fact, has the right to get that rather important piece of information.

Likewise, nothing prevents an individual from crying fire in the confines of his own home. If he wants to cry fire——

Senator DENTON. Nobody is addressing that.

Mr. LYNN. No, but here we are talking——

Senator DENTON. We are addressing someone selling something that amounts to not only harmful materials, but which constitute a false representation. The characterization presented of sexuality by

the pornographers is not one which is truthful. You can either agree or deny that.

But it is something which is postulated in an absurd and perverse way. They go from adultery and premarital sex to perversion, to sadism, masochism. You can look up the statistics and histories of individuals who resort to sexually abusing children, such as those runaway youths in New York, and you will very often find in the background of those abusers a history of using pornographic materials, which has substantial impact on their subsequent behavior.

The question is whether those who are engaging in the world's oldest profession are not strongly inhibiting the success of the world's second oldest profession, which is motherhood. Are we going to have a strong family life with the way things are going now?

The question is how accurately is life depicted when media images grossly favor the preverse and never show a couple going to church on television. That is a lie.

Mr. LYNN. I agree.

Senator DENTON. The importance of recognizing the existence of God and of self-discipline with ourselves, which must accompany and temper our freedom—that is what is being destroyed in all of this.

I do not know how to address it, but that is the way I am calling a spade a spade, and I think we need to look into it.

Mr. LYNN. Well, I agree with much of what you say. I happen to support Covenant House and I like what they do because they are trying to meet genuine needs of kids who were not just hurt by pornography, but were hurt by a wide variety of social injustices and social factors which have made their lives miserable, up to the point that they ran away from home and ended up in New York City.

So I in no way denigrate the work that Father Ritter does. I like him and I like his organization. I think the world, however, is not going to be by any demonstrable method improved simply by restricting 57-second messages on telephones.

I think that what is going on in the family in this country is the result of a complex series of factors and that we really do a disservice to the final solution of the problem of finding a healthier, better way to develop sexuality in our country if we think that the solution is to curtail dial-a-porn messages or R-rated films on television.

I just do not think that the world operates that simply or that this would have any practical impact on the very serious degeneration of values that I suspect in some very important ways you and I share.

Senator DENTON. If we took each one of the incremental influences which you, I think, would agree are unfortunate, one of them might be dial-a-porn. I agree that stopping that may not result in major revolutionary changes.

But you also mentioned that there was no harm in children using dial-a-porn; that you did not think that would have much effect on them. We have a lot of testimony to the contrary which I would invite you to have a look at any time you care to.

We have to have a two-sided conversation on this. You have to represent, or someone does, the need to respect the first amendment and people's freedoms.

But we are focusing on sociatal norms, and on conduct, not speech. The question is whether we try to adopt as norms deviations, and if we do, we are in trouble. And it is not unprecedented in history that societies like ours have gone down the drain for just that cause.

Mr. LYNN. Well, I understand, I think, and I appreciate the consideration that you give to that. But I do think that ultimately the answer as far as the values that you are talking about is for people like yourself, for broadcasters like Pat Robertson, the Christian Broadcasting Network, and other people who believe in them and who have the facilities to promote these values to get out there and criticize the images in pornography.

They are exercising the best of first amendment values when they do that, and that forms a competition, a competing idea, which, if we believe in the first amendment, may well drive out "wrong" ideas.

You know, I do not just look at this thing theoretically, Senator. I have two kids, a dog and station wagon. I am a very straightlaced person in many, many ways. But to suggest that the remedy is to abridge any of the free expression guarantees of the Constitution is to set forth on a very dangerous path.

Senator DENTON. Abridging Constitutional guarantees is not my aim, nor is it the aim of Senator Helms or Senator Laxalt. We are trying to sustain that which has been law, and that is our duty.

I am not trying to abridge the first amendment at all. I am trying to make sure that the first amendment is not abused, and that the intent of the first amendment and the rulings of the Supreme Court over the years defending that which the Founding Fathers established in the Constitution, are preserved.

So I do not think we are apart in theory, and I will not be placed in the position of someone who wants to abridge the first amendment. I am simply reiterating what the first amendment has been defined as permitting, and supporting prohibitions on that which the first amendment is not designed to protect.

Mr. LYNN. I understand that, and ultimately it is not the judgement of the legislature or the judgment of the ACLU what the first amendment means. It is the decision of the courts, and I suspect if this legislation is passed in some form, we will all spend many years litigating those important questions.

Senator DENTON. I want to thank you very much, Mr. Lynn.

Mr. LYNN. Thank you.

Senator DENTON. We will send you written questions, and I would like to work with you, if you will, on the development of this bill because you represent certain concerns which must be taken into account and applied to whatever legislative efforts we make.

[The prepared statement of Mr. Lynn follows:]

PREPARED STATEMENT OF BARRY W. LYNN

Mr. Chairman and Members of the Subcommittee:

Thank you for the opportunity to testify. The American Civil Liberties Union (ACLU) is a national membership organiztion of approximately 250 000 persons committed to the preservation and enhancement of the constitutional guarantees of the Bill of Rights.

Efforts to regulate the content of material which is transmitted over cable television or throuqh the telephone are two more significant steps in a disturbing rebirth of censorship efforts in the United States. Regrettably, there seems to be a near obsession on the part of some Americans to use the judicial system to curtail the right of their neighbors to receive information in the privacy of their own houses. It is no less disturbing that the material people want curtailed today is sexually-oriented. It is no great leap from intolerance and attempted suppression of offensive sexual ideas to intolerance and attempted suppression of religious and political beliefs which are viewed as obnoxious or bizarre. There may well be a quite natural impulse to get rid of those images and ideas we encounter which offend us. However. the First Amendment requires that we eschew suppression. and replace it with personal rejection and public rebuttal.

The State of the Law

The Supreme Court has carved out several exceptions from the First Amendment for certain forms of sexually-oriented speech. In 1957, the Court in Roth v. United States 354 U.S. 476 (1957) held that "obscenity" was not entitled to constitutional protection. In Miller v. California 413 U.S. 15 (1973) "obscenity" was defined to encompass material which (1) appeals to the "prurient interest" as judged by the average person

applying "contemporary community standards", (2) "describes or depicts, in a patently offensive way" specified sexual conduct defined by statute, and (3) which "as a whole . . lacks serious literary, artistic, political or scientific value". In F.C.C. v. Pacifica Foundation 438 U.S. 726 (1978), the Court approved of Federal Communications Commission sanctions for broadcasting during the day certain "indecent" speech, even if it was not obscene, largely because such broadcasts reached both unwilling adult listeners and children "Indecent" was essentially defined as "patently offensive" sexual material, which would meet the second prong of the Miller test.

It is no secret that the ACLU does not approve of these decisions. In summary, we believe that "sexual speech" does certain ideas, albeit frequently offensive ones graphically disseminated, which ought to be accorded constitutional protection. Likewise, the standards in Miller and Pacifica are hopelessly vague and overbroad, casting a chill on sellers, producers, and broadcasters who need to fear that particularly sensitive or particularly zealous persons will be offended and seek legal recourse.

The ACLU takes no position on the "quality" or "social utility" of speech, pornographic or otherwise. However, even the often offensive messages of "dial-a-porn" and the sometimes disturbing images in motion pictures on cable television ought to receive First Amendment protections. Rational discourse specifically designed to educate is not the only "speech" protected by the guarantees of free expression.

The Supreme Court recognized the significance of non-rational expression in Cohen v. California 403 U.S. 15, at 26 (1970) where it assessed the impact of Cohen entering the trial court wearing a jacket emblazoned with the words "Fuck The Draft":

> "[M]uch linguistic expression serves a dual communicative function: it conveys not only

> ideas capable of relatively precise, detached explication, but otherwise unexpressible emotions as well. In fact, words are often chosen as much for their emotive as their cognitive force. We cannot sanction the view that the Constitution, while solicitous of the cognitive content of individual speech, has little or no regard for that emotive function which, practically speaking, may often be the more important element of the overall message sought to be communicted. ."

Likewise, "speech" interests may extend even to exotic nude dancing: "[E]ntertainment, as well as political and idealogical speech, . . . fall[s] within the First Amendment guarantee" Schad v. Borough of Mount Ephraim 452 U.S. 61, 65 (1981) (citations omitted).

In addition to protecting even emotionally-charged entertainment, the First Amendment commands that protection of children not become a catch-all justification for the curtailment of the rights of adults. As Justice Frankfurter noted in striking down a statute which prohibited the sale of books "tending to the corruption of the morals of youth", the risk it presented was "to reduce the adult population to reading only what is fit for children". Butler v. Michigan 352 U.S. 380 (1957).

This is not the forum in which to rekindle the battle over "obscenity" law as such. However, I would like to focus on why the Miller and Pacifica holdings themselves do not permit broad intrusions into the distribution of sexually-oriented material on cable television or over telephones.

Current criminal law regarding sexual material on cable television is found in section 614 of the Cable Policy Act of 1984, P.L. 98-549 That provision states that "whoever transmits over any cable system any matter which is obscene or otherwise unprotected by the Constitution of the United States shall be fined not more than $10,000 or imprisoned not more than 2 years, or both." (Another provision, in Sec. 612(h), relates only to channel capacity leased by the cable operator to others for

commercial purposes and purports to permit franchising authorites to reject not only "obscene" programming, but any which is "in conflict with community standards in that it is lewd. lascisious, filthy or indecent".)

Current law on sexual material over the telephone is codified in 47 U.S.C. 223(a), initially enacted in 1968 to respond to the problem of unwanted "obscene, abusive. or harassing telephone calls" H.R. Rep. No. 1109, 90th Cong., 2nd Sess. 2. So-called "dial-a-porn" did not exist in 1968. In 1983, Congress amended 47 U.S.C. 223 with a provision which prohibits "obscene or indecent" speech transmitted to persons under eighteen years of age if done for "commercial purposes." This statute required that regulations be promulgated by the Federal Communications Commission. The regulations adopted provided that operators of "dial-a-porn" services could use as a defense that they confined their service to the hours between 9:00 p.m. and 8:00 a.m. Eastern Time. and exempted "for pay" telephone sex services from prosecution if they required credit card payment before the conversation began. In Carlin Communications, Inc. v. F.C.C., 749 F. 2d 113 (2nd Cir. 1984), the Court set aside these regulations on time restrictions arguing that they were too drastic and not unnecessrily well-tailored to meet the goal of denying access to children. The Court did not decide the underlying constitutionality of the statute, and a new F.C.C. proceeding on regulating the services is now underway.

Renewed Congressional Interest

It is clear that some members of Congress wold now like to go much further than current law in abridging the right of Americans to communicate about sexual matters through cable television and the telephone. S. 1090, sponsored by Senators Helms, East, and Denton, is an effort to restrict the content of cable and telephone communication. This legislation is both

unnecessary and unconstitutional. Legislation could, however, be developed which would enhance parental control over televisions and telephones without abridging First Amendment values.

S. 1090 and Cable

This bill provides criminal and civil sanctions against "whoever utters any obscene, indecent, or profane language, or distributes any obscene, indecent, or profane material by means of radio or television, including cable television". It establishes penalties including fines of up to $50,000 and/or imprisonment for up to two years. "Obscenity" has, of course, a legal definition. "Indecency", as used in Pacifica, appears to include speech which meets only the second prong of the Miller test for "obscenity": "patently offensive references to excretory and sexual organs and activities". "Profanity" has no apparent legal meaning, but generally subsumes language which is "impure", "sacrilegious", or "vulgar".

From floor statements already made in support of this measure, it appears that its primary sponsor intends to reach material which rejects "the tradition which binds human sexuality inseparable to marriage and sees its fruits in the family" or which shows" depictions of nudity and sexual intercourse, explicit homosexual activity, actual violence toward animals, and other degrading scenes . . ." (Statement of Sen. Helms, Congressional Record S. 5543 (May 7, 1985).

Any effort to bar all "indecent or profane" programming on cable clearly runs afoul of the First Amendment. It goes well beyond the narrow holding of Pacifica, which involved speech broadcast to both unwilling adult listeners and children through the uniquely pervasive medium of broadcasting.

Several federal courts have already examined the constitutionality of state statutes very similar to the "cable porn" section of S. 1090. In Cruz v. Ferre 755 F. 2d 1415 (11th

Cir. 1985), HBO v. Wilkinson 531 F. Supp. 987 (D. Utah 1982), and Community Television of Utah v. Ray City (D. Utah, 1982), the courts found broad "indecency" bans to violate the First Amendment.

These courts found cable a medium quite distinct from, and far from analogous to, broadcast transmissions. Cable requires a paid subscription by the user and the subscriber holds the ultimate power to terminate his or her subscription. Although a car driver meandering through the mountains may have a very limited number of radio stations to twist the dial toward, the cable subscriber in nearly every market has at least 35 channels to choose from and in some has close to 100. The essence of cable programmins is choice: the right of the viewer to decide what he or she desires to watch. In addition, virtually all cable systems send out in advance monthly guides which help viewers avoid unpleasant programming surprises.

It is not even clear that "obscene" programming over cable may be prohibited, although some state law provisions in this area have been upheld. In Stanley v. Georgia 394 U.S. 557 (1969) the Supreme Court held that even "obscene" material may be viewed in one's own home: "If the First Amendment means anything it is that a state has no business telling a man, sitting alone in his own house, what he may read or what films he may watch." Admittedly, the court has also held that the "privacy" interest in the home does not mean that all means of distribution are also protected (see, for example, United States v. 12 200 Ft. Rolls of Film 413 U.S. 123 (1973)). However, it is also true that cable television programming is distributed quite differently than books, 8mm films, and motion pictures in theaters. The transmission of cable is from one private place, a studio or satellite transmission facility, to another private place, the home. There is no public transfer or marketing of the product through such a facility as a store or theater.

Moreover, even if "obscene" material can be proscribed, "indecent" or "profane" transmissions clearly cannot. To reach such programming would be to effectively bar virtually every R-rated, and many PG-13 and PG rated films from cable, depriving viewers of one of the principal reasons for purchasing the service. It is not just the cable operator whose First Amendment rights would be violated, but also the rights of millions of viewers who currently enjoy these services.

Notwithstanding my earlier argument that the nature of the cable medium difffers from broadcasting, it is not even clear that the George Carlin monologue in Pacifica which was deemed "patently offensive" by the Court may be substantively compared to occasional nudity or profanity in a cablecast. (Carlin's routine consisted of repetition of seven so-called "dirty words" in a pattern Justice Powell described as "verbal shock treatment".) The Federal Communications Commission has, on several occasions, wisely decided not to extend Pacifica in the manner contemplated by S. 1090. See, for example, In Re Pacifica Foundation (WPFW-FM) 95 F.C.C. 2d 750 (1984) (distinction between the "isolated use of a potentially offensive word in the course of a radio broadcast" and the "verbal shock treatment" of having words repeated over and over) and Decency in Broadcasting 94 F.C.C. 2d 1162 (1983) (Pacifica accords FCC no general prerogative to intervene in any case where words are similar or identical to those in Carlin's monologue).

Dial-A-Porn

There are two forms of "dial-a-porn" services: sexually-oriented conversations with live operators and brief taped conversations accessible through 976-numbers in several cities. S. 1090 is designed to reach both of these types of service, and to go even further by barring any interstate, foreign, or District of Columbia communication which is a "comment, request,

suggestion, or proposal which is obscene, lewd, lascivious, filthy, or indecent, regardless of whether the maker of such comments placed the call". There is no requirement, however, that the calls be made for commercial purposes. Therefore, even a conversation between two married persons discussing a future sexual encounter which a judge or jury thinks is "filthy" would be liable for fines up to $50,000 and/or imprisonment for up to six months.

The First Amendment and the constitutionally-based right of privacy preclude governmental control over the content of telephone "Dial-It" communications, even if "obscene". Miller notes that "these specific prerequisites [the three prong test] will provide fair notice to a dealer in such materials that his public and commercial activities may bring prosecution" Id. at 27. Although "Dial-It" has a "commercial" purpose, it cannot reasonably be labelled "public". Communication between parties is facilitated by a totally automated, electronic switching system which does not even involve a third party, such as a mail carrier. Even phone calls from a pay phone booth are considered private communications. Katz v. United States 389 U.S. 347 (1967).

It is clear that the right of free expression may be balanced against a right of personal privacy under some circumstances, particularly in regard to the so-called "unwilling listener". Where this conflict in fact exists, "the right to be left alone must be placed in the scales with the right of others to communicate". Rowan v. Post Office Department 397 U.S. 728,736 (1970). However, voluntary use of "Dial-It" services intrudes upon no privacy rights of others. There are absolutely no unwilling listeners. It is a quintissential example of the right to receive information and ideas. The service can be accessed only by the affirmative act of a voluntary listener who has clear knowledge of what he or she is about to hear. It is easy to

guarantee that the call cannot be overheard, so there is no danger that the call will actually prove offensive to any unconsenting persons.

As with cable, FCC v. Pacifica, supra, provides absolutely no authority to regulate telephone "dial-it" services. Pacifica holds only that certain offensive but otherwise protected broadcast speech may be regulated during certain hours because of the uniquely pervasive qualities of broadcasting. The Pacifica Court's two principal concerns are inapplicable to "dial-it" service. First, "because the broadcast audience is constantly tuning in and out, prior warnings cannot completely protect the listener or viewer from unexpected program content". Id. at 748. Second, "physical separation of the audience cannot be accomplished in the broadcast media. During most of the broadcast hours, both adults and unsupervised children are likely to be in the broadcast audience, and the broadcaster cannot reach willing adults without also reaching children". Id. at 758 (opinion of Powell, J.). Neither applies to "dial-it" services where the caller knows clearly what he or she is about to hear and where children cannot normally "overhear" the conversation. Moreover, in Carlin Communications Inc. v. FCC, supra, the Court commented that "it may well be that the [Supreme] Court's holding in Pacifica is inapplicable outside the broadcast context." 749 F. 2d at 120 (citing Bolger v. Youngs Drug Products Corp. 463 U.S. 60 (1983)).

For a period of time between the issuance by the FCC of the original "dial-a-porn" regulations and the determination of their unconstitutionality by the Second Circuit Court of Appeals, "dial-a-porn" providers ceased to provide sexually-explicit messages between the hours of 8:00 A.M. and 9:00 P.M. Out of curiosity, I called a New York City "dial-a-porn" number in mid-afternoon to hear what replaced the sexually-oriented messages. What I heard was a message by a female voice indicating that she

was an "oak tree" who understood that the caller was a "woodpecker". The voice seductively, or perhaps lasciviously, inquired whether the caller would like to "come into my branches to peck". Now, the tone of the message was unmistakably sexual, and were some words replaced by common and obviously sexual ones, the message would be precisely what was intended to be prohibited by the statute. I don't think we want to have the FCC or the federal courts trying to figure out whether mere anonymously-spoken words purportedly about either intercourse or bird-watching are impermissible for adults to hear.

S. 1090 poses another series of constitutional problems because of its language on "dial-a-porn" which seeks to permit injunctions against services "which allegedly" violate the statute. Only a fact-finder can make a valid final determination even of "obscenity" because, as noted in Freedman v. Maryland 380 U.S. 51, 58 (1965): "Only a judicial determination in an adversary proceeding insures the necessary sensitivity to freedom of expression . . ." In addition, it is inconceivable that in any balancing of equities, alleged harm cause by any 57-second message would outweigh the free expression guarantees of the First Amendment.

Cable, Telephones, and the Problem of Children

One of the realities of technological advances is that they sometimes breed their own solutions to the alleged "problems" they generate. In this regard, certain improvements in cable and telephone technology actually enhance parental control over their childrens' "information-gathering".

Since even possession of "obscene" material is protected in one's home, see Stanley v. Georgia, supra, the mere possibility of children dialing a number or tuning into an R-rated film should not be allowed to bar the service any more than the possibility of a child finding a father's copy of Hustler in

a closet justifies stopping the sale of that publication at the newsstand. Parents have a right to regulate the access of their children to all kinds of material which they consider offensive. They are not, however, absolutely entitled to the support of laws to aid the discharge of their parental responsibilities.

Parents may be disturbed because they do not want their child to hear a message or because of the cost where large numbers of "dial-a-porn" calls are made by their children. (The Defense Department is similarly distressed by the number of such calls by their employees.) The remedy here, however, need hardly be curtailment of the service for all persons. Parental purchase of a screening device is a constitutionally acceptable substitute. At least one company, Telecommunications Technology Corporation, has obtained FCC approval for marketing a microprocessor based minicomputer which uses the telephone dial as a keyboard for inputting instructions that enable users to block calls to any combination of digits and exchanges (except the 911 emergency number). Through use of this device, parents can guarantee that only those whom they choose to tell the "unlocking" code may dial exchanges they believe contain inappropriate material. (The fact that juveniles can call "dial-a-porn" from a public phone also does not permit the broad intrusion of this proposed legislation. The communication is not willfully or publicly disseminated to minors and the telephone number is published in magazines sold only to adults.) Likewise, 612 (d)(2)(a) of the Cable Communications Policy Act requires that every cable operator provide, upon request, a device (the so-called "lock-box") capable of restricting access to any channels which parents consider unsuitable for their children--whether that is Music Television (MTV), Showtime, or the Christian Broadcasting Network (CBN). In proceedings by the F.C.C., the ACLU has even endorsed a regulatory requirement that such devices must be provided at a "reasonable cost" so that no

segment of the cable market is prevented from obtaining them.

Children in our society cannot be shielded from the possibility of every sexually-suggestive image or idea without complete governmental regulation of all means of communication, to say nothing of regulation of summer clothing and beach attire. Young people will, I suspect, always be interested in the topic of sex, and "dial-a-porn" has for some become the electronic equivalent of looking up "dirty words" in the dictionary. Children who do have an encounter with the exposition of sexual values which are offensive to their parents are not likely to be ruined forever by the experience. There is nothing "magical" about "dial-a-porn" or "R-rated movies". They neither replace the values taught before a young person encounters them, nor prevent parents, schools, churches, and other institutions from successfully combatting the values such messages and films promote. Under our understanding of the First Amendment, the remedy for "rotten speech" is always competition by "quality" alternative speech.

The proper balance between privacy and free speech, for adults as well as children, is always difficult to determine. The Supreme Court in Erznoznik v. City of Jacksonville 422 U.S. 205, (1975) noted, however, in regard to drive-in movie screens which might show occasional nude images to passing children that "in the absence of a showing that substantial privacy interests are being invaded in an essentially intolerable manner, the burden normally falls upon the viewer to avoid further bombardment of his sensibilities by averting his eyes". In fact, it is possible to walk through 99.9% of the streets of America without coming across a single graphic sexual image. No reasonably open or tolerant society can permit legal actions based on irritation or umbrage taken by chance encounters with offensive images.

AMERICAN CIVIL LIBERTIES UNION

WASHINGTON OFFICE

600 Pennsylvania Ave. SE
Suite 301
Washington, DC 20003
(202) 544-1681

National Headquarters
132 West 43rd Street
New York, NY 10036
(212) 944-9800

Norman Dorsen
PRESIDENT

Ira Glasser
EXECUTIVE DIRECTOR

Eleanor Holmes Norton
CHAIR
NATIONAL ADVISORY COUNCIL

August 28, 1985

Jeremiah Denton
United States Senator
United States Senate
Committee On The Judiciary
Washington, D.C. 20510

Dear Senator Denton:

Enclosed are responses to your recent questions regarding my Testimony on S.1090, the Cable Porn Act.

I appreciated the opportunity to testify on this important matter.

Sincerely,

Barry W. Lynn

Barry W. Lynn
Legislative Counsel

BWL:dyt

Enclosures

NO FIRST AMENDMENT PROTECTION

DO YOU AGREE THAT IN AN UNBROKEN SERIES OF CASES EXTENDING OVER A LONG STRETCH OF THE HISTORY OF THE UNITED STATES SUPREME COURT, IT HAS BEEN ACCEPTED THAT OBSCENE MATERIAL IS NOT PROTECTED BY THE FIRST AMENDMENT?

Since the 1957 decision in Roth v. United States, so-called "obscene" material which is both public and commercial may be regulated or barred. However, private possession of even "obscene" material may not be criminalized.

COMMERCIAL ENTERPRISES

DO YOU AGREE THAT CABLE TELEVISION AND "DIAL-IT" SEX SERVICES ARE COMMERCIAL ENTERPRISES, OPERATING IN THE PUBLIC SPHERE, USING A PUBLIC MEANS OF COMMUNICATION, AND THEREFORE SUBJECT TO GOVERNMENT REGULATION LIKE ANY OTHER PUBLIC BUSINESS?

Although cable television and "dial-it" services are generally commercial enterprises, the fact that they involve the communication of ideas means one must be extremely careful in attempting to regulate them. Even though both Hustler magazine and hog forming may be offensive to many people, the First Amendment is implicated only when the goverment tries to regulate the former.

HARMFUL TO MINORS

DO YOU AGREE THAT THERE IS A SPECIES OF SPEECH WHICH IS REGARDED AS "INDECENT" OR "HARMFUL TO MINORS," AND AS A MATTER OF CONSTITUTIONAL LAW IS SUBJECT TO REGULATION UNDER CIRCUMSTANCES WHERE MINORS ARE CONCERNED, EVEN THOUGH THE SPEECH IS NON-OBSCENE (THAT IS, DOES NOT MEET THE FULL "MILLER" OBSCENITY TEST).

Only in the context of broadcasting has an "indecency" standard ever been upheld by the Supreme Court. The Pacifica case, in my view, is inapplicable to cable or telephone communication for reasons cited in my testimony. Pacifica cannot even be read to permit the F.C.C. to ban the George Carlin monologue from the airwaves at all hours.

PACIFICA CASE

DIDN'T THE SUPREME COURT IN THE PACIFICA CASE REFER IN THE FOOTNOTES TO THE INAPPROPRIATENESS OF NUDITY ON TELEVISION, AS WELL AS UPHOLDING THE "INDECENT" STANDARD FOR RADIO? WHY SHOULDN'T THESE PROSCRIPTIONS APPLY TO CABLE TV AS WELL?

Cable television is a quite different creature than broadcast radio or television. People must affirmatively choose to purchase cable services. If they find the programming indecent, or just lousy, they have the absolute power to terminate their subscription.

STATE CABLE TV LEGISLATION

IN YOUR WRITTEN TESTIMONY YOU MENTION SEVERAL FEDERAL COURT DECISIONS WHICH EXAMINED STATE CABLE TV LEGISLATION. DID THOSE CABLE TV CASES DECIDE THE LIMITS OF CONGRESS' POWER TO PROHIBIT INDECENCY ON CABLE TELEVISION OR TELEPHONE?

The cited cases concern state and local efforts to regulate "indecent" cable programming. They were not about Congressional actions. They do, however, suggest that there is a strong First Amendment impediment to any governmental control over the contents of cable television.

THERE IS A GOVERNMENT POLICY AGAINST EXHIBITING SEXUAL ACTIVITY IN PUBLIC FOR COMMERICAL PURPOSES. SUCH IS REGARDED AS "LEWD ACTIVITY." THE COURTS HAVE SAID: "IF YOU CANNOT PERFORM SUCH ACTIVITY IN 3 DIMENSIONAL FORM, YOU CAN'T PHOTOGRAPH IT AND DEPICT IT IN 2 DIMENSIONAL FORM."

SHOULD CABLE TV BE ALLOWED TO SHOW ACTUAL SCENES OF EXPLICIT SEXUAL ACTIVITY?

I believe the First Amendment can and should be read to permit cable television to show persons engaged in explicit sexual activity.

Senator DENTON. The record will be held open an additional 30 days for receipt of testimony from those individuals who were unable to attend today as witnesses, and will be held open an additional 15 days to allow questions to be addressed to those who submit written testimony.

Within the original 30-day period, the witnesses may expect additional questions which they will be requested to answer.

I thank everyone for their kind attention and participation. This hearing stands adjourned.

[Whereupon, at 12:54 p.m., the subcommittee was adjourned.]

APPENDIX

FREEDOM OF EXPRESSION
FOUNDATION

DR. CRAIG R. SMITH
PRESIDENT

TESTIMONY OF THE FREEDOM OF EXPRESSION FOUNDATION PRESENTED TO THE CRIMINAL LAW SUBCOMMITTEE OF THE SENATE COMMITTEE ON THE JUDICIARY REGARDING S. 1090, THE "CABLE-PORN AND DIAL-A-PORN CONTROL ACT"

Dr. Craig R. Smith, President
M. Joel Bolstein, Research Director
Stephen E. Coran, Legal Intern

414 South Capitol Street, S.E.
Washington, D.C. 20003

We would like to thank the members of the Subcommittee on Criminal Law for allowing us to present the views of the Freedom of Expression Foundation regarding S. 1090, the "Cable-Porn and Dial-A-Porn Control Act." The Foundation is a non-profit research organization whose members form a broad-based coalition of broadcasters, cable operators, newspaper publishers, advertising agencies, telecommunications suppliers, educators, retailers, labor unions, large and small corporations, and others with an interest in freedom of expression. Our testimony focuses on S. 1090's restrictions on the airing of "obscene, indecent or profane material" on cable television.

I. S. 1090 Is Unconstitutional Because It Impermissibly Restricts The First Amendment Rights Of Cable Operators To Distribute Information To The Public.

The First Amendment provides in relevant part that "Congress shall make no law. . .abridging the freedom of speech, or of the press. . ." The First Amendment encompasses the right to speak, Cohen v. California, 403 U.S. 15 (1971), the right to distribute information, Schneider v. State, 308 U.S. 147 (1939), and the right to receive information, Stanley v. Georgia, 394 U.S. 557 (1969). And in Gitlow v. New York, 268 U.S. 652 (1925), the Supreme Court made clear that these First Amendment rights applied to state and local governments. The threshold question before this Subcommittee is whether S. 1090 is

unconstitutionally overbroad because it regulates the content of protected First Amendment communication.

The right of the public to receive cable communications is derived from the First Amendment right of the cable operator to disseminate protected speech. Cable operators do have First Amendment rights. See Home Box Office, Inc. v. FCC, 567 F.2d 9 (D.C. Cir.), cert. denied, 434 U.S. 829 (1977); Midwest Video Corp. v. FCC, 571 F.2d 1025 (8th Cir. 1978), aff'd on other grounds, 440 U.S. 689 (1979). The Supreme Court has stated that the First Amendment "rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public." Associated Press v. United States, 326 U.S. 1 (1945). See National Association of Theatre Owners v. FCC, 420 F.2d 194, 207 (D.C. Cir. 1969), cert. denied, 397 U.S. 922 (1970); Community Communications Co., Inc. v. City of Boulder, 660 F.2d 1370, 1376 (10th Cir. 1981). The public is best served by a cable operator who offers a diversity of information and entertainment programming. The public is poorly served when the government acts to censor or limit the kinds of information and entertainment programming a cable operator can provide. Such regulation would violate an inherent corollary of the First Amendment which provides: "The right of freedom of speech and press. . .embraces the right to distribute literature, and necessarily protects the right to receive it." Martin v. Struthers, 319 U.S. 141, 143 (1943); Stanley v. Georgia, 394 U.S. 557, 564 (1969).

Our nation has made a commitment to promoting the growth and development of cable communications and its technology. The Cable Policy Act of 1984, Pub. L. No. 98-548, 98th Cong., 2d Sess., 1984, recognized this commitment by including among its enumerated purposes that of "assur[ing] that cable communications provide and are encouraged to provide the widest possible diversity of information sources and services to the public." 47 U.S.C. 601(4).

Cable operators are free to offer a wide variety of material for public consumption mainly because news and public affairs information and motion pictures are "included within the free speech-free press guaranty of the First and Fourteenth Amendments." Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 502 (1952). Nevertheless, certain categories of cable communication are clearly not protected by the First Amendment. This would include libel, slander or obscenity. In Miller v. California, 413 U.S. 15 (1973), the Supreme Court defined "obscene" through the following test: "(a) whether 'the average person, applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest. . .; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value. . ." Miller, 413 U.S. at 23. While Miller would arguably permit local governments to regulate cable programming that is obscene, it would not allow the Federal

58-804 0 - 86 - 5

government to regulate "indecent or profane material" as proscribed in S. 1090. Furthermore, in Jenkins v. Georgia, 418 U.S. 153, 161 (1974), the Supreme Court said that "nudity alone is not enough to make material legally obscene under the Miller standards." Only hard-core sexual material is punishable as obscene. Id.

Programming that is merely "indecent" does not fall within the bounds of Miller, and the courts have been reluctant to extend the Miller definition to cable programming that is not obscene. In Cruz v. Ferre, 571 F. Supp. 125 (S.D. Fla. 1983), aff'd, 755 F.2d 1415 (11th Cir. 1985), the court struck down a Miami ordinance which provided that "[n]o person shall by means of a cable television system knowingly distribute by wire or cable any obscene of indecent material." Furthermore, a federal district court in Utah has twice held that a local ordinance intended to apply to cable systems providing for revocation of licenses or franchise permits to businesses engaging in the distribution of "indecent" material was unconstitutional. Community Television of Utah, Inc. v. Roy City, 555 F.Supp. 1164 (N.D. Utah 1982); Community Television v. Wilkinson, 11 Med. L. Rptr. 2217 (N.D. Utah 1985). Along similar lines, S. 1090 violates the fundamental principles of the Constitution, in that it prohibits a cable television operator from distributing material that is not hard-core pornography, and it prevents the public from receiving this protected material through the medium of cable television.

II. The Pacifica Rationale Is Inapplicable To Cable Television.

The Supreme Court has, under very narrowly defined circumstances, extended the class of unprotected expression to include speech which, while not obscene, is indecent. In FCC v. Pacifica Foundation, 438 U.S. 726 (1978), the Court held that the FCC could impose administrative sanctions upon a radio licensee for broadcasting indecent material at a time when children were likely to be in the audience. In upholding the FCC's decision, the Court said that "of all forms of communication, it is broadcasting that has received the most limited First Amendment protection." Id. at 748. The Court noted that broadcasting had a "pervasive" presence and was uniquely accessible to children. Id. at 749.

In the only case in which the Court has been asked to consider the limits of Pacifica, the Court in Bolger v. Youngs Drug Products Corp., 463 U.S. 60 (1983), held that the application of a federal statute preventing the mailing of unsolicited contraceptive advertisements likely to be offensive violated the First Amendment. The Court "emphasized the narrowness" of its Pacifica holding and refused to apply its rationale to the mails, finding the receipt of mail to be "far less intrusive and uncontrollable" than radio dissemination. The Court rejected the argument that parental control of sex education of their children was sufficient to supercede the First Amendment considerations involved. The Court held in Bolger that the fact that protected speech may be offensive to some does not justify its total suppression. 463 U.S. at 64.

A central concern in both Bolger and an earlier case, Butler v. Michigan, 352 U.S. 380 (1957), is the infringement on the rights of the majority. In Butler, the Court held that a state could not reduce the adult population "to reading what is fit only for children." 352 U.S. at 383. Similarly, the government's interest in protecting children from indecent material does not justify reducing the adult cable subscriber population to viewing programming which is fit only for children.

Cable television does not fall under the "pervasiveness" standard applied in Pacifica; it is not an unwanted "pig in the parlor." Cable television is a medium financed by viewer subscriptions. Cable is only available to those who take the affirmative step to contact the cable operator and ask that a wire be brought into the home and connected to the television. To receive entertainment services such as HBO, Showtime, and the Playboy Channel, a subscriber must pay an extra monthly charge. A scrambled signal prevents reception for those who have not paid such a premium. Therefore, the choice of receiving cable channels containing adult-oriented material is left to the subscriber. As the Supreme Court stated in Erznoznik v. City of Jacksonville, 422 U.S. 205, 210 n.6 (1975), the fact that a commercial enterprise directs its programming only to paying customers presumably establishes that those customers are neither unwilling viewers nor offended. They invite the programming into the privacy of their home well aware of its contents.

Furthermore, the Cable Communications Policy Act of 1984 requires all cable operators to make available to their subscribers "a device by which the subscriber can prohibit viewing of a particular cable service during periods selected by the subscriber." 47 U.S.C. 624(d)(2)(A). A subscriber with children may acquire a "lock box" to prevent reception of certain cable channels without his authorization. Finally, the cable subscriber can terminate service at any time simply by informing the cable operator that his subscription should be cancelled. Thus, cable television is by its very nature no more intrusive than any home-delivered newspaper, magazine, book or record. As such, it is entitled to full First Amendment protection.

III. S. 1090 Impermissibly Limits The Editorial Discretion Of The Cable Operator And Is Therefore Unconstitutional.

In Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974), the Supreme Court unanimously struck down a Florida statute that required "rights of reply" in newspapers. The Court held that this restriction on editorial choice violated the First Amendment. The Court said that "the choice of material to go into a newspaper, and the decisions made as to the limitations of size and content of the paper. . .constitute the exercise of editorial control and judgment." Miami Herald Publishing Co., 418 U.S. at 258.

The Supreme Court has recognized the similarities between newspapers and cable television. In FCC v. Midwest Video Corp.,

440 U.S. 689, 707 (1979), the Court said that cable operators exercise "a significant amount of editorial discretion regarding what their programming will include." This view has found support among both the Commission and commentators. In Community Cable, Inc., 54 RR2d (P&F) 1351, 1359 (FCC 1983), the FCC held that "[t]he current situation requires that system operators and nonbroadcast programming entrepreneurs retain maximum flexibility in the marketplace to experiment with types of program offerings." One commentator remarked that "[c]able operators, no less than newspaper publishers, communicate their own expression as well as the expression of others they select for communication over their system." Kurland, Introduction to Shapiro, Kurland and Mercurio, 'Cablespeech', at viii (1983). Clearly, a cable system, like a newspaper, is "more than a passive receptacle or conduit for news, comment, and advertising." Miami Herald Publishing Co., 418 U.S. at 258.

Cable television operators perform an editorial function similar to newspapers. Cable companies originate programming. Some cable communicators engage in editorializing which significantly contributes to our nation's commitment that "debate on public issues should be uninhibited, robust, and wide-open." New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964). As the Court reiterated in NAACP v. Claiborne Hardware Co., 485 U.S. 886, 913 (1982), "expression on public issues has always rested on the highest rung of First Amendment values." Because cable systems perform the same function as newspapers by informing the public on the issues of the day, any governmental restrictions placed on the cable operator's selection of program

material must satisfy strict First Amendment standards. Since S. 1090 cannot withstand scrutiny under the Miller and Jenkins tests, we respectfully submit that it is an unconstitutional abridgment of the rights of cable operators and cable consumers.

IV. The Scarcity Rationale Is Inapplicable To Cable Television, And Cable Television Is Clearly Entitled to Full First Amendment Protection.

The Supreme Court has recognized that the First Amendment requires the Court to give individualized attention to the particular medium of communication involved in a given case. In Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546, 557 (1975), the Court found that "[e]ach medium of expression . . . must be assessed for First Amendment purposes by standards suited to it." Broadcasting is regulated by the Communications Act of 1934, 47 U.S.C. 151 et seq. Since the days of the crystal set, broadcast regulation has been premised on the belief that there are a fixed number of electromagnetic frequencies. Therefore, broadcasters must act as fiduciaries of the public interest. See, e.g., National Broadcasting Co. v. United States, 319 U.S. 190, 213 (1943); Red Lion Broadcasting Co. v. FCC, 395 U.S. 367 (1969).

This spectrum scarcity argument was briefly applied to cable television at a time when cable was primarily a passive re-transmitter of over-the-air broadcast signals. See Black Hills Video Corp. v. FCC, 399 F.2d 65 (8th Cir. 1968). But the cable industry has grown tremendously since 1969. There are

presently 6,600 cable systems in the United States, serving some 18,500 communities. Cable television reaches over 37 million subscribers and is available to two-thirds of the households in America. Broadcasting/Cablecasting Yearbook, 1985, p. D-3. Furthermore, cable is capable of unlimited growth. Thus no scarcity of electromagnetic frequencies exists for cable television. Audiences can receive as many cable channels in a city as the city chooses to allow.

Furthermore, the scarcity rationale as applied to broadcasting has recently been called into question by the Supreme Court in FCC v. League of Women Voters of California, 104 S. Ct. 3106, n. 11 (1984). Other recent reports and articles have concluded that the scarcity rationale is no longer valid. See National Telecommunications and Information Administration, U.S. Dept. of Commerce, Print and Electronic Media: The Case for First Amendment Parity (1983); Notice of Inquiry into Section 73.1910 of the Commission Rules and Regulations Concerning the General Fairness Doctrine Obligations of Broadcast Licensees, 49 Fed. Reg. 20,317 (1984); Brenner, Communications Regulation in the Eighties: The Vanishing Drawbridge, 33 Admin. L. Rev. 255 (1981).

Furthermore, every recent appellate court decision that has considered this question has concluded that the scarcity rationale is inapplicable to cable television. See Preferred Communications, Inc. v. City of Los Angeles, California, 754 F.2d 1396 (9th Cir. 1985); Omega Satellite Products Co. v. City of Indianapolis, 694 F.2d 119, 127 (7th Cir. 1982); Community Communications Co. v. City of Boulder, 660 F.2d 1370, 1379 (10th

Cir. 1981), cert. dismissed, 456 U.S. 1001 (1982); Midwest Video Corp. v. FCC, 571 F.2d 1025, 1048 (8th Cir. 1978), aff'd on other grounds, 440 U.S. 689 (1979); Home Box Office, Inc., 567 F.2d 9, 43-46 (D.C. Cir.), cert. denied, 434 U.S. 829 (1977). Cable television should have parity with newspapers and other fully protected mediums of communication.

Conclusion

Our research over the last two and a half years on the First Amendment, and our current examination of this legislation, forces the Freedom of Expression Foundation to conclude that S. 1090 is unconstitutionally overbroad in that it puts limitations on the distribution of fully protected communication. For the reasons stated above, we respectfully request that this Subcommittee withdraw or vote down the proposed legislation in that it is a patent violation of the First Amendment.

58-804 0 - 86 - 6

SIMÓN B. MIRANDA, PH.D.
CLINICAL PSYCHOLOGIST
7811 CORAL WAY, SUITE 132
MIAMI, FL 33155
TELEPHONE (305) 262 2202

Carol Clancy
c/o The Honorable Jeremiah A. Denton,
U.S. Senator
Russell Senate Bldg, Room 198
Washington, D.C. 20510

July 30, 1985

Dear Ms. Clancy:

I hope that the material that I am enclosing will be helpful. As you can see, in this cases televised pornography has been used in attempts to seduce and/or pervert the intended victims. I have more material in my files which will be systematically retrieved for any future need.

God bless you and the work you are doing.

Yours sincerely,

Simón B. Miranda, Ph.D.

SIMÓN B. MIRANDA, PH.D.
CLINICAL PSYCHOLOGIST
7811 CORAL WAY, SUITE 132
MIAMI, FL 33155
TELEPHONE (305) 262 2202

CASE STUDIES

Case Number One:

When Mr. X, now 30, was 12-13 years old, he would masturbate to fantasies of his girlfriend (approximately his own age), and her friends.

At 22-25 years of age, Mr. X was a consumer of printed pornography (books, magazines).

Through marriage, at 25 years of age, Mr. X acquired a 5-year old step-daughter. Years later, Mr. X bought some T.V. (video) equipment and a free movie was included with it. Among other pornographic materials, the movie showed nude bodies of prepubertal girls. When his step-daughter was 9 years old, Mr. X "accidentally" saw her undressed buttocks once and was sexually stimulated. Soon thereafter, he began to abuse her sexually through genital opposition. The child reportedly would cover her face during the incidents and say, "Daddy, I don't want to see".

While acknowledging that seeing the mentioned movie contributed to his abusing his step-daughter, Mr. X explained that another movie, which he had seen on "On-T.V.", had influenced him even more. In this latter movie, Mr. X explained, a father had abused sexually the older of two daughters and impregnated her, and eventually the child committed suicide. What was important for Mr. X, however, was that since the father was not violent with his victim, "it was a secret that she didn't tell", and therefore he expected that if he did not use force with his stepdaughter, she too would keep the secret.

Case Number Two:

Even though his father had already confessed sexual abuse of his son and of other children to the police, 10-year old "B" at first denied any abuse whatsoever.

Much later in the interview, he acknowledged having seen pornographic magazines jointly with his father, which aroused him sexually. Later, he admitted having engaged in reciprocal fellatio with his father.

Prior to the sexual acts, he and his father would watch pornographic materials on a T.V. channel. Often, "B" said, his father would be sitting on a chair watching the television while performing fellatio on him.

Case Number Three.

Ten-year old "Q" was a victim of repeated acts of anal intercourse from his mother's live-in boyfriend. Moments prior to the first incident, the offender showed "Q" pictures of homosexual and heterosexual acts in an attempt to convince him that what was about to happen was "natural". One of the scenes involved "two boys doing it", but the offender, himself still an adolescent, tried to convince "Q" that those represented were a father and a son.

Case Number Four.

Sixteen-year old "S", who is Mentally Retarded, reported that her sexual abuser (her 34-year old "boyfriend"), began to show her pornographic movies prior to beginning to assault her sexually.

Colmery-O'Neil
Veterans Administration
Medical Center

2200 Gage Boulevard
Topeka KS 66622

Veterans
Administration

In Reply Refer To

August 9, 1985

Senator Jeremiah Denton
United States Senate
Committee on the Judiciary
Washington, D.C. 20510

Dear Senator Denton:

Thank you for the opportunity to contribute to your hearing before the Subcommittee on Criminal Law on the matter of Cable-Porn and Dial-a-Porn.

I have analyzed and evaluated the meaning of pornography and its effects on individuals and society from the perspective of a psychiatrist and psychoanalyst. My conclusions have motivated me to take a very strong stand against the pornography industry for many years as an expert witness in the courts, at conferences, as a public speaker on radio and television and directly with live audiences. In my opinion pornography is doing enormous harm to individuals and to society.

Pornography is nothing more than the wide spread depiction of human sexual perversion and the most gross debasement and abuse of women and children and, of course, it debases the male too who is the main perpertrator of these sexual acts--and all of this for monitary gain. I need not in this letter describe the various acts except to say that earlier perverse acts which involve various bodily structures other than the genitalia are now being embellished by acts of homosexuality, sadism and masochism, bestiality and pedophilia. Not to be overlooked is the total absence of a relationship--let alone a loving one--between the man and woman, if indeed, the pornographic material is limited to such a pair.

Cable-Porn and Dial-a-Porn simply permits an enormous proliferation of the pornographic industry. This material can now and does enter the private dwellings of individuals and most alarmingly, the home. Many adults who would not venture into a porno theater or buy pornographic material will

turn on their TV sets or dial a phone number. Children will do the same when their parents are away, and furthermore because there are so many part-time and incomplete families the number of children exposed will be great. Such exposure evokes those latent perverse trends in many people which had remained dormant, and it teaches the young sexual styles which will tend to deflect them from the best direction as they continue to mature.

Not to be overlooked is the transmission of this pornographic material by the dish receiver which picks up signals from satellites. This technological development may be as great an avenue for distribution as cable TV and the U.S. mail.

I believe Senator Helms' Bill is a most important one. To those who cry censorship, I respond by noting that it is society's responsibility to protect individuals and society itself from destructive influences. Public health laws serve this purpose as do laws and our best human values.

Most respectfully yours,

Harold M. Voth

HAROLD M. VOTH, M.D.
Chief of Staff
Clinical Professor Psychiatry
University of Kansas
Professor of Psychiatry
Karl Menninger School of Psychiatry

STATEMENT ON BEHALF OF MORALITY IN MEDIA, INC. REGARDING S.1090, THE "CABLE-PORN AND DIAL-A-PORN CONTROL ACT" FOR THE SUBCOMMITTEE ON CRIMINAL LAW OF THE SENATE JUDICIARY COMMITTEE

AUGUST 23, 1985

The Subcommittee on Criminal Law of the Senate Judiciary Committee is currently gathering testimony and reviewing S.1090, the Cableporn and Dial-a-Porn Control Act, introduced by Senator Jesse Helms. Morality in Media, Inc., a non-profit public interest organization which combats the distribution of pornography in the United States, offers these comments for consideration by the subcommittee.

The current legislative proposal, S.1090, attempts to accomplish two goals:

1. To include cable television along with broadcasting in the federal regulation of obscene and indecent material by amending 18 U.S.C. §1464.

2. To prohibit all obscene or indecent interstate communications by means of telephone regardless by who places the call. The bill would eliminate the "consenting adults" exception and the affirmative defense for Dial-a-Porn operators found in 47 U.S.C. §223(b).

While the goals of this legislation are admirable, S.1090 is flawed in two respects. First, the sponsors attempt to address two unique topics, Dial-a-Porn and Cableporn, in one piece of legislation instead of treating them in two separate bills. We recommend that two bills be prepared so that these issues will receive individual attention from the Congress. Second, the bill uses the terms "obscenity" and "indecency", two highly complex legal concepts, without benefit of definition. We recommend that these terms be properly defined by referring to United States Supreme Court decisions interpreting them.

CABLE TELEVISION: OBSCENITY, INDECENCY, AND PROFANITY

Obscenity

18 U.S.C. §1464, "Broadcasting obscene language," currently reads:

> Whoever utters any obscene, indecent or profane language by means of radio communication shall be fined not more than $10,000 or imprisoned not more than two years, or both.

The original language of §1464 goes back to 1929. The definition of "obscene" has changed since that date and we cannot rely on past legislative history, nor is there a Supreme Court case telling us what "obscene" means in a radio, television, or cablevision setting in today's world. We do not know what the word "obscene" means in this medium insofar as the Supreme Court of the United States is concerned because there is no authoritative construction of this word in this setting by that Court. A definition is thus in order.

The case of Miller v. California, 413 U.S. 15 (1973) gives us guidelines on how to write an obscenity statute when it states at page 24 the current three-pronged test:

> The basic guidelines for the trier of fact must be: (a) whether "the average person, applying contemporary community standards" would find that the work, taken as a whole, appeals to the prurient interest... (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.

The Court in that case said at 23-24:

> We acknowledge, however, the inherent dangers of undertaking to regulate any form of expression. State statutes designed to regulate obscene materials must be carefully limited. As a result, we now confine the permissible scope of such regulation to works which depict or describe sexual conduct. That conduct must be specifically defined by the applicable state law, as written or authoritatively construed. (emphasis added).

Indecency

As well, "indecent" has not as yet had a sufficient authoritative construction. In F.C.C. v. Pacifica Foundation, 438 U.S. 726 (1978), the Federal Communications Commission took the trouble to define indecency and the Supreme Court upheld the definition for purposes of that broadcasting case. The F.C.C. argued that indecency is a standard separate and apart from obscenity. The Court agreed, giving us a broad general definition of the meaning of indecency at 740: "nonconformance with accepted standards of morality." If we merely define the term "indecency" in accordance with this broad general

description, we would have an inadequate definition and the statute would be void for vagueness. However, at several points in the opinion the High Court referred to the second prong of the obscenity test in Miller v. California, supra, describing "indecent" material as that which is "patently offensive." For example, the Pacifica Court states on page 744:

> The question in this case is whether a broadcast of patently offensive words dealing with sex and excretion may be regulated because of its content. (emphasis added).

The F.C.C. also defined "indecent" in terms of "patent offensiveness" when it presented a statute for the consideration of Congress in 1976 (cf. "Report on the Broadcast of Violent, Indecent and Obscene Material," 9 F.C.C. No. 75-202 (2/19/75)).

Profanity

The current statute includes the term "profane" and so the attached bill provides a definition based on Duncan v. United States, 48 F.2d 128, decided under 47 U.S.C.A. §109, a predecessor or 18 U.S.C. §1464.

In summary, there is just too much danger in trying to achieve a short cut on language. The F.C.C. understood this problem when it defined the term "indecent" in both its proposed legislation in 1976 and in its Declaratory Order in Pacifica. Brevity in this particular instance is not a virtue, but a vice. The constitutional difficulties associated with vague and indefinite statutes are great. The Supreme Court has spelled out these vices in past decisions. In Grayned v. City of Rockford, 408 U.S. 102, 108-09 (1972) the Court said:

> It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined...[W]e insist that laws give a person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he can act accordingly... A vague law impermissibly delegates basic policy matters to policemen, judges and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application ...[W]here a vague statute abuts upon sensitive areas of basic First Amendment freedoms it operates to inhibit the exercise of those freedoms. Uncertain meanings inevitably lead citizens to steer far wider of the unlawful zone than if the boundaries of the forbidden areas were clearly marked.

Accordingly, the attached bill for amending 18 U.S.C. §1464 includes definitions for obscenity, indecency, and profanity.

DIAL-A-PORN: "CONSENTING ADULTS," BUTLER V. MICHIGAN, AND INDECENCY

"Consenting Adults"

47 U.S.C. §223 was amended in the 98th Congress to prohibit the use of a telephone for transmitting dial-a-porn messages except to consenting adults in the mistaken belief that there were constitutional requirements that dictated such an exception. Thus for the first time in the history of the United States or any state of the Union the purveying of "obscenity" was specifically authorized and legalized.

The attention of Congress is now being called to the error of that belief and is reminded that there is no "consenting adults" concept in the obscenity field. On the contrary, the United States Supreme Court has consistently rejected this theory and has made it clear that, in the pornography area, there is no doctrine of "consenting adults." In Paris Adult Theatre I v. Slaton, 413 U.S. 49 (1973), the Supreme Court

indicated that the mere fact that all of the patrons of an adult theatre were "consenting adults" did not require that the obscenity conviction of the adult theater for showing them an obscene film had to be nullified. Slaton says that there is no "right to receive" pornography even if you are a group of "consenting adults" discretely gathered in an "adult theatre" from which minors are excluded. United States v. Reidel, 402 U.S. 363, decided by the Supreme Court in 1971, held that the statute against mailing obscenity, 18 U.S.C. §1461, is not unconstitutional as applied to the distribution of obscene materials to willing recipients who stated that they are adults. United States v. Orito, 413 U.S. 139, decided in 1973 by the Supreme Court, stands for the proposition that the knowing interstate transportation of obscene matter by means of common carrier for private use may be constitutionally prohibited under 18 U.S.C. §1462. Nor was §1462 unconstitutional because it applies to non-public means of transportation which "in itself involved no risk of exposure to children or unwilling adults." The Court said at 141-43:

> The District Court erred in striking down 18 U.S.C. 1462 and dismissing appellee's indictment on these 'privacy' grounds. The essence of appellee's contentions is that Stanley has firmly established the right to possess obscene material in the privacy of the home and that this creates a correlative right to receive it, transport it, or distribute it. We have rejected that reasoning. This case was decided by the District Court before our decisions in United States v. Thirty-Seven Photographs, 402 U.S. 363 (1971) and United States v. Reidel, 402 U.S. 351 (1971). The Government has a legitimate interest in protecting the public commercial environment by preventing such material from entering the stream of commerce.

The Court continues:

> We cannot say that the Constitution forbids comprehensive federal regulation of interstate transportation of obscene material merely because the material is intended for the private use of the transporter. That the transporter has an abstract proprietary power to shield the obscene material from all others and to guard the material with the same privacy as in the home is not controlling... Congress could reasonably determine such regulation to be necessary to effect permissible federal control of interstate commerce in obscene material, based as

> that regulation is on a legislatively determined risk of ultimate exposure to juveniles or to the public and the harm that exposure could cause. See Paris Adult Theater I v. Slaton... It is sufficient to reiterate the well-settled principle that Congress may impose relevant conditions and requirements on those who use the channels of interstate commerce in order that those channels will not become the means of promotion or spreading evil, whether of a physical, moral or economic nature. (emphasis supplied).

It is clear from Orito that pornography laws are designed not to punish the buyer of obscenity, or the viewer or the "hearer," but the purveyor, the one who improperly uses the channels of interstate commerce (be that the mails, the telephone, interstate transportation, importation, or broadcasting) to transmit pornography. It is the desire of Congress to maintain the decency of these means of communication that justifies the regulation.

United States v. 12 200-Ft. Reels, 413 U.S. 123 (1973) stands for the proposition that Congress may constitutionally proscribe importation of obscene matter notwithstanding that

the material is for the importer's private personal use and possession. At 126-29 the Court says:

> Claimant contends that, under Stanley, the right to possess obscene material in the privacy of the home creates a right to acquire it or import it from another country. This overlooks the explicitly narrow and precisely delineated privacy right on which Stanley rests. That holding reflects no more than... the law's "solicitude to protect the privacies of the life within the home"... We have already indicated the protected right to possess obscene material in the privacy of one's home does not give rise to a correlative right to have someone sell or give it to others. The Constitution does not compel, and Congress has not authorized, an exception for private use of obscene material. (emphasis supplied).

Indeed, when this 98th Congress legislation amending Section 223 was tested in the courts, the judges of those courts clearly indicated that Congress has the power to completely refuse the use of any telephone facility for the transmission of obscene dial-a-porn. In the District Court case of Carlin Communication, Inc. v. Smith, 83 Civ. 9004 (S.D.N.Y. May 8, 1984 at page 12) Judge Motley said:

> If their speech ultimately is determined to be "obscene" then such speech does not fall within the protection of the First Amendment.

In the Second Circuit dial-a-porn case of Carlin Communications, Inc. v. F.C.C., 749 F.2d 113 (2d Cir. 1984), Judge Oakes, speaking for the court said at 121, nte. 12: "obscene speech... is not protected by the First Amendment." (emphasis supplied)

It was therefore a mistake, and a grievous one, to unnecessarily legalize "obscene speech" and S.1090 is designed, inter alia, to correct that error. The bill retains the prohibition of indecent speech and again rejects the "consenting adults" concept on the same rationale as indicated in the Supreme Court cases on obscenity. The prohibition is on the purveyor of obscenity, not the recipient, and the Supreme Court has indicated that Congress has the right to maintain the decency of interstate channels of communication.

Butler v. Michigan

Accessibility by minors in their own homes to dial-a-porn services was of primary concern to the 98th Congress in the adoption of the current version of Section 223. However, both adults and minors still have substantial access to dial-a-porn under the current law, principally because of the mistaken impression by the Congress that the United States Supreme Court case of Butler v. Michigan, 352 U.S. 380 (1957) requires access by telephone for adults to obscene and indecent material. This interpretation of Butler is incorrect.

Proponents of the current Dial-a-Porn law relied on the Butler case to establish adult access to obscene materials. This reliance is misplaced, since obscene materials are completely unprotected by the First Amendment (See Miller v. California, 413 U.S. 15 (1973)). As the Supreme Court stated in F.C.C. v. Pacifica Foundation, 438 U.S. at 745: "Obscenity may be wholly prohibited." The Butler decision never outlined any reason for adult access to obscene materials.

Miller applies to adults and children alike, making no distinction for access to obscenity for anyone.

In F.C.C. v. Pacifica Foundation, supra, the United States Supreme Court upheld the use of an indecency standard by the Federal Communications Commission for radio broadcasts. The Court's reasoning was twofold:

1. A medium that intrudes into the home with great frequency and regularity can be regulated in order that it not offend the homeowner.

2. The unique accessibility of children to a home-installed medium creates a legitimate governmental concern for what may be harmful to them.

This reasoning applies equally well to the telephone as it does to broadcasting, and the Butler decision simply does not address these important concerns. Butler requires that, in a situation where one can differentiate between

minors and adults, a "harmful-to-minors" standard can only be applied to minors and not to adults. However, dial-a-porn services cannot make such a differentiation since it is impossible to prevent minors from calling these services as they are now structured. Further, Butler does not deal with an indecency standard, but instead a "harmful-to-minors" standard. Butler therefore does not apply and instead Pacifica does apply. Pacifica shows that where one cannot differentiate between minors and adults (such as in a radio audience) then anindecency standard is justified for both minors and adults alike. The Pacifica Court at 750, nte. 28 rejected the argument that the use of an indecency standard violates the holding in the Butler case.

Indecency

As noted by the Second Circuit court in Carlin Communications, Inc. v. F.C.C., supra, Congressman Thomas J. Bliley has pointed out that the indecency standard of the Pacifica case is intended to apply to dial-a-porn. As Judge Oakes said at 116, nte. 7: "While the views of a sponsor

of legislation are by no means conclusive, they are entitled to considerable weight, particularly in the absence of a committee report." (Emphasis supplied). Judge Oakes quoted Representative Bliley, the original sponsor of the current law, as saying:

> [T]he ruling in Pacifica clearly affirms the F.C.C.'s ability and authority to examine material to determine whether it is obscene or indecent and to assess fines on that basis.

In Hott v. State, 400 N.E. 2d 206, transfer denied, (viz, cert. denied) 409 N.E. 2d 1082 (1980) (Supreme Court of Indiana), cert. denied, Hott v. Indiana, 449 U.S. 1132 (1981), an Indiana appellate court recognized the application of the indecency standard in the context of telephone calls and defined it in the same manner as did the Pacifica Court:

> We observe that Ind. Code 35-30-91(a) contains the words "obscene, lewd, lascivious, filthy or indecent" (emphasis added) in the disjunctive, which, according to the authority of Pacifica Foundation, supra, implies a separate meaning to each. The word "indecent" refers to nonconformance with accepted

standards of morality.
(emphasis supplied)

The use of the disjunctive "or" in the dial-a-porn context indicates that both the word "obscene" and the word "indecent" have meaning. The Pacifica court has noted that the use of the word "or" indicates that each part of the separation is significant. The Hott court, as quoted above, mentions this effect.

Accordingly, the attached dial-a-porn bill eliminates the "consenting adults" exception and the affirmative defense for Dial-a-Porn operators. As well, appropriate definitions are provided for "obscene" and "indecent."

A BILL

To Amend Title 18, Section 1464 of the United States Code

Section 1464, Title 18 of the United States Code shall be amended as follows:

"Section 1464. Broadcasting, telecasting, or cablecasting of obscenity or indecency obscene language

(a) Offense.--Whoever knowingly utters any obscene, indecent, or profane language, or distributes any obscene or indecent material by means of radio, television, or cable television communication shall be fined not more than $10,000, or imprisoned not more than two years, or both, if the subject matter is obscene, and shall be fined not more than $5,000, or imprisoned not more than one year, or both, if the subject matter is indecent or profane.

(b) Definitions.--As used in this section:

(1) 'obscene material' means material which:

(a) the average person, applying contemporary community standards for radio or television, would, find, taken as a whole, appeals to the prurient interest; and

(b) depicts or describes, in a patently defensive way: an ultimate sexual act, normal or perverted, actual or simulated; or masturbation; or an excretory function; or a lewd exhibition of a human genital organ; or flagellation, torture, or other violence, indicating a sado-masochistic sexual relationship; and

(c) taken as a whole, lacks serious literary, artistic, political, and scientific value.

(2) 'indecent' language or material means a depiction or description of: a human sexual or excretory organ or function; or nudity;

or an ultimate sexual act, normal or perverted, actual or simulated; or masturbation; or flagellation, torture, or other violence, indicateing a sado-masochistic sexual relationship, which under contemporary community standards for radio or television is presented in a patently offensive way.

(3) 'profane' means irreverant toward God or holy things, or speaking or acting in manifest contempt of sacred things, or calling down the curse of God on an individual.

(4) 'distribute' means to send, transmit, retransmit, telecast, broadcast, or cablecast, including by wire or satellite, or product or provide such language or material for distribution.

(c) Nothing herein is intended to intefere with or preempt the power and right of the states and their political subdivisions over franchises or to regulate in this area as to obscenity or indecency, within their respective jurisdictions, in a manner which is not inconsistent with this section."

[Crossed-out material is deleted; underlined material is added.]

This Dial-a-Porn bill is similar in many respects to S.1090, except that it adds definitions not found in S.1090 and prohibits "obscene or indecent communication for commercial purposes" rather than any obscene or indecent comments. It also contains a severability clause.

A BILL

To Amend the Communications Act of 1934, Title 47, United States Code, Section 223.

Section 223, Title 47, United States Code Shall be Amended as follows:

"Sec.223 (a) Whoever—

(1) in the District of Columbia or in interstate or foreign communications by means of telephone—

(A) makes any comment, request, suggestion or proposal which is obscene, lewd, lascivious, filthy, or indecent;

(B) makes a telephone call, whether or not conversation ensues, without disclosing his identity and with intent to annoy, abuse, threaten, or harass any person at the called number;

(C) makes or causes the telephone of another repeatedly or continuously to ring, with intent to harass any person at the called number; or

(D) makes repeated telephone calls, during which conversation ensues, solely to harass any person at the called number; or

(2) knowingly permits any telephone facility under his control to be used for any purpose prohibited by this section, shall be fined not more than $50,000 or imprisoned not more than six months, or both.

(b)(1) Whoever knowingly —

(A) in the District of Columbia or in interstate or foreign

communication, by means of telephone, makes (directly or by recording device) any obscene or indecent communication for commercial purposes to any person ~~under eighteen years of age or to any other person without that person's consent~~, regardless of whether the maker of such communication placed the call; or

(B) permits any telephone facility under such person's control to be used for an activity prohibited by subparagraph (A), shall be fined not more than $50,000 or imprisoned not more than six months, or both.

~~(2) it is a defense to a prosecution under this subsection that the defendant restricted access to the prohibited communication to persons eighteen years of age or older in accordance with procedures which the Commission shall prescribe by regulations.~~

(2)~~(3)~~ In addition to the penalties under paragraph (1), whoever, in the District of Columbia or in interstate or foreign communication, intentionally violates paragraph (1)(A) or (1)(B) shall be subject to a fine of not more than $50,000 for each violation. For purposes of this paragraph, each day of violation shall constitute a separate violation.

(3)~~(4)~~(A) In addition to the penalties under paragraphs (1) and(2) ~~(3)~~ whoever, in the District of Columbia or in interstate or foreign communication., violates paragraph (1)(A) or (1)(B) shall be subject to a civil fine of not more than $50,000 for each violation. For purposes of this paragraph, each day of violation shall constitute a separate violation.

(B) A fine under this paragraph may be assessed either—

(i) by a court, pursuant to a civil action by the Commission or any attorney employed by the Commission who is designated by

the Commission for such purposes, or

(ii) by the Commission after appropriate administrative proceedings.

(4) ~~(5)~~ The Attorney General may bring a suit in the appropriate district court of the United States to enjoin any act or practice which violates paragraph (1)(A) or (1)(B). An injunction may be granted in accordance with the Federal Rules of Civil Procedure .

(c) As used in subsection (b)(1), the term —

(1) 'obscene communication' means any language or material respectively which —

(A) the average person, applying contemporary community standards would find, taken as a whole, appeals to the prurient interest and

(B) depicts or describes, in a patently offensive way: (i) an ultimate sexual act, normal or perverted, actual or simulated, (ii) masturbation, (iii) an excretory function, (iv) a lewd exhibition of a human genital organ, or (v) flagellation, torture, or other violence, indicating a sado-masochistic sexual relationship; and

(C) taken as a whole, lacks serious literary, artistic, political, and scientific value;

(2) 'indecent communication' means a depiction or description of (A) a human sexual or excretory organ or function, (B) nudity, (C) an ultimate sexual act, normal or perverted, actual or simulated, (D) masturbation, or (E) flagellation, torture, or other violence, indicating a sado-masochistic sexual relationship, which under contemporary community standards is presented in a patently offensive way; and

(3) 'material' means anything that is capable of being used or adapted to arouse interest, whether through the medium of reading, observation, sound or in any other manner.

(d) If any of the depictions or descriptions or use of language set forth in this Section or any matter or matters prohibited herein is or are declared by a court of competent jurisdiction to be unlawfully included herein, such declaration shall not invalidate this section as to other depictions, descriptions or prohibited matter or

matters included herein.

(e) No telephone common carrier or any of its subsidiaries or related entities shall be liable under this section for transmitting any language or communication prohibited herein unless such carriers, subsidiaries, or related entities, as the case may be, were actively involved in originating the service or was itself the message provider."

[Crossed-out material is deleted; underlined material is added].